Supreme Court, U.S.
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No. 95 1698

In The

Supreme Court of the United States

October Term, 1995

STRATTON GEORGOULIS,

Petitioner,

v.

UNITED STATES OF AMERICA and
ALLIED PRODUCTS CORPORATION,

Respondents.

**Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a corporate officer can be personally liable under CERCLA § 107(a)(3) as a person who "arranged for disposal" of a corporation's waste when the undisputed evidence shows that (1) the corporate officer had no knowledge of the disposal of waste, and (2) the corporate officer took no intentional action "by contract, agreement or otherwise" to arrange for the corporation's waste disposal.

PARTIES

PETITIONER: Stratton Georgoulis

RESPONDENTS: United States of America
Allied Products Corporation

OTHER PARTIES TO THE JUDGMENT BELOW:

TIC Investment Corporation

TIC Investment Corporation was a wholly owned subsidiary of TIC United Corp. and was merged into TIC United Corp. in 1995. TIC Investment Corporation has no non-wholly owned subsidiaries. Sup. Ct. Rule 29.6.

TIC United Corp.

TIC United Corp. has no non-wholly owned subsidiaries. Sup. Ct. Rule 29.6.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Stratton Georgoulis ("Georgoulis") files this Petition for a Writ of Certiorari and would respectfully show as follows:

OPINIONS BELOW

Copies of the following orders and opinions are attached as appendices: (1) the opinion of the United States Court of Appeals for the Eighth Circuit, decided October 16, 1995 (68 F.3d 1082); (2) the district court's opinion dated September 19, 1994 (866 F.Supp. 1173); and (3) an order of the United States Court of Appeals for the Eighth Circuit, dated January 3, 1996, denying petitioner's petition for a rehearing and suggestion for rehearing en banc.

JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Eighth Circuit was entered on October 16, 1995. The Eighth Circuit entered an order on January 3, 1996 denying petitioner's petition for a rehearing and suggestion for rehearing en banc.

This Court has jurisdiction under 28 U.S.C. § 1254(1) to review on a writ of certiorari the judgment and opinion of the Eighth Circuit.

STATUTES INVOLVED

Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9607 (West 1995):

§ 9607. Liability.

(a) Covered persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section –

(1) the owners and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for –

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

STATEMENT OF THE CASE

Petitioner Georgoulis is the sole shareholder and president of TIC Investment Corporation ("TICI") and TIC United Corporation ("TICU") (collectively, the "TIC entities"). The TIC entities are investment holding companies. In December 1980, subsidiaries of TICI purchased White Farm Equipment Company ("WFE") out of bankruptcy. From December 1980 through October 1985, WFE was a third-tier subsidiary of either TICI or TICU. Georgoulis was the chairman of the boards of TICI, TICU and WFE.[1]

[1] Although Georgoulis was acting president of WFE from December 1980 until November 1981, another WFE officer (Robert Fuller, WFE's vice president and chief operating officer) carried out WFE's day-to-day operations.

For the 14 years prior to its purchase out of bankruptcy by the TIC entities, WFE owned and operated a farm implement manufacturing plant in Charles City, Iowa. The WFE plant generated foundry sands containing hazardous substances, and the sands were disposed of at a privately-owned dumpsite in the Charles City, Iowa area ("the dumpsite"). Georgoulis and the TIC entities had no interest in WFE for the majority of time that foundry sands were disposed of at the dumpsite. The owner of the dumpsite transported WFE's wastes to the site and charged WFE on a per-load basis. A two-year lease arrangement between WFE and the dumpsite owner lapsed shortly after WFE was purchased by the TIC entities in 1980.

It is undisputed that Georgoulis had no knowledge of the waste disposal practices at the dumpsite, nor was Georgoulis in any way directly involved in WFE's waste disposal matters. It is further undisputed that neither Georgoulis nor any employee of the TIC entities had personal knowledge of the arrangement between WFE and the owner of the dumpsite for the disposal of WFE's wastes. At all relevant times, Georgoulis' operations were based in Dallas, Texas. Moreover, Georgoulis visited WFE's Charles City plant only three to four times between 1980 and 1985.

During the period 1980-1985, Georgoulis's attention was directed at attempting to bring a crippled and mismanaged WFE out of bankruptcy. Georgoulis negotiated agreements with the labor union and replaced key management personnel in an attempt to bring some semblance of financial security to WFC. All these efforts failed, however, and in May 1983, WFE was refinanced

through a loan restructuring agreement. Two years later, in May 1985, WFE defaulted on its loan and reentered bankruptcy. WFE's assets were sold to Allied Products Corporation ("Allied") in October 1985.

In 1988, the United States Environmental Protection Agency placed the dumpsite on the National Priorities List and began remediation efforts. As a result, Allied and the United States incurred response costs, and they sued TICI, TICU, and Georgoulis under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9607, seeking the recovery of the response costs incurred as a result of the remediation effort at the dumpsite. Jurisdiction in the district court was based upon 42 U.S.C. §§ 9604, 9607 and 9613. Supreme Court Rule 14.1(g)(ii).

Both sides filed motions for summary judgment. The district court granted partial summary judgment in favor of Allied and the United States, holding that the TIC entities and Georgoulis were liable as "arrangers" for disposal of hazardous waste under CERCLA § 107(a)(3). The district court certified its order granting summary judgment for interlocutory appeal under 28 U.S.C. § 1292(b)[2] and stayed further proceedings pending appeal.

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[2] The fact that Congress, by enacting the Interlocutory Appeals Act of 1958, 28 U.S.C. § 1292(b), has indicated a policy favoring interlocutory appeals where the case involves a "controlling question of law as to which there is a substantial ground for difference of opinion" the resolution of which would materially advance the termination of the litigation is a factor that this Court has implicitly considered in ruling on petitions for certiorari. *See* Stern, Gressman and Shapiro, SUPREME COURT PRACTICE (6th ed.) at 4.19 p. 226-27 (citations omitted).

The Eighth Circuit granted the petition filed by the TIC entities and Georgoulis for permission to appeal under 28 U.S.C. § 1292(b). After the parties filed briefs and after hearing oral argument, the court of appeals issued an opinion on October 16, 1995 affirming in part and reversing in part the district court's grant of summary judgment. The court of appeals reversed that portion of the district court's judgment imposing liability on the TIC entities. As a result, TICI and TICU are not petitioners in this Court.

However – and notwithstanding the undisputed fact that Georgoulis had no personal knowledge of or any direct involvement in the disposal practices at issue – the court of appeals affirmed the portion of the judgment imposing "arranger" liability on Georgoulis as a corporate officer.

REASONS FOR GRANTING THE WRIT

This Court should grant this petition for certiorari because the judgment and opinion of the Eighth Circuit in this case is "in conflict with the decision of another United States court of appeals on the same important matter," Supreme Court Rule 10(a), as well as the plain language of CERCLA. A corporate officer has been held personally liable for the cleanup costs of a superfund site as an "arranger" even though he took no intentional action "by contract, agreement, or otherwise" regarding disposal of the corporation's wastes. CERCLA § 107(a)(3). As discussed below, the Eighth Circuit's ruling in this case conflicts with rulings of the Seventh and Second Circuits, not to mention numerous federal district court

opinions involving the very issue before this court. *See Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 691 (1994); *General Electric Co. v. AAMCO Transmissions, Inc.*, 962 F.2d 281 (2d Cir. 1992).

Moreover, the Eight Circuit's imposition of "arranger" liability based solely upon Georgoulis' "authority to control" management aspects of WFE, is inconsistent with the express language of CERCLA § 107(a)(3) and case law interpreting that section. The decision in this case cannot be reconciled with the statute, which requires some direct, active involvement by a corporate officer to actually make arrangements for disposal as a prerequisite for "arranger" liability under CERCLA. Mere "indirect" involvement or control does not rise to the level of conduct required by the statute, and, as a result, is insufficient to support the liability the Eighth Circuit has imposed upon Georgoulis.

The policy reasons for requiring intentional action are clear. In theory, every chief executive officer of every corporation has the ultimate "authority to control" every matter in the corporation. In reality, however, corporate decision making involves delegation of authority and reliance on the judgment of others. If mere "authority to control" management and operational aspects were sufficient to impose liability under CERCLA Section 107(a)(3), then every chief executive officer of every corporation is potentially liable as a person who "arranged for disposal" of that corporation's waste. The case before this Court illustrates the fundamental problem with such an approach, as well as the reason that intentional conduct is a prerequisite to "arranger" liability. Here, the Eighth Circuit improperly imposed personal liability for clean-up costs on an individual who purchased a company out

of bankruptcy, even though he had no interest in the company for the vast majority of the time period in question and he never had any knowledge of or involvement in the company's waste disposal practices. This Court should resolve the conflict between the Eighth Circuit and other federal appellate courts. Otherwise, innocent corporate officers face unlimited personal liability for waste disposal practices of which they had no knowledge or involvement.

A. "Arranger" liability under CERCLA.

CERCLA § 107(a)(3) imposes liability for response costs on (among other responsible parties):

> any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person . . . .

The critical words in Section 107(a)(3) are "arranged for." *Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 691 (1994). "The words imply *intentional action.*" *Id.* at 751 (emphasis supplied). A person cannot be a responsible party under Section 107(a)(3) unless that person *takes some intentional action to arrange for disposal of a hazardous substance.* Georgoulis took no such action.

An Alabama federal district court recently adopted this same rationale in *Redwing Carriers, Inc. v. Saraland Apts., Ltd.*, 875 F. Supp. 1545 (S.D. Ala. 1995). In *Redwing*, the court refused to hold certain defendants liable as "arrangers," citing *Amcast* for the proposition that the words "arranged for . . . imply intentional action." *Id.* The *Redwing* court twice noted that there was insufficient

evidence to persuade a reasonable jury that certain defendants "intended to dispose" of hazardous waste and made the "crucial decisions regarding how, where, and when" to dispose of the waste. *Id.*

Georgoulis does not suggest that liability under CERCLA requires some showing of intent. CERCLA is clearly a strict liability statute and no showing of intent or negligence is necessary. Nevertheless, before a person can be found strictly liable under CERCLA, that person must first be found to fall into one of the four classes of persons listed in Section 107(a) as responsible parties. Those persons include (1) the current owner or operator of a facility, (2) the former owner or operator of a facility at the time of disposal of a hazardous substance, (3) any person who arranged for disposal of any hazardous substance, and (4) transporters of hazardous substances to a facility.

While intent does not play a role in assessing liability under CERCLA, it does play a role in determining if a person fits into one of the four categories of responsible parties. The only category at issue here is the third category, persons who arranged for disposal. As shown below, Georgoulis is not a person "who arranged for disposal" of WFE's hazardous wastes, and the Eighth Circuit erred in concluding otherwise.

B. Liability as an "arranger" requires intentional acts or conduct.

The Eighth Circuit's holding in this case is in direct conflict with the Seventh Circuit's holding that the words "arrange for" imply intentional action. *Amcast*, 2 F.3d at

751. Other courts have also specifically found that liability under Section 107(a)(3) is dependent on intentional acts or conduct. *See, e.g., United States v. Cello-Foil Prod., Inc.* 848 F. Supp. 1352, 1357 (W.D.Mich. 1994) (it is well established in the Sixth Circuit that "arranger liability is dependent on intentional conduct"); *United States v. Arrowhead Ref. Co.*, 829 F. Supp. 1078, 1094-95 (D. Minn. 1992) ("Liability under CERCLA attaches only to persons who actually transact in a hazardous substance for the purpose of treatment or disposition"). The court below created a conflict between the circuits in this regard.

1. Mere indirect control is insufficient for arranger liability.

The Eighth Circuit improperly focused on Georgoulis' status as chairman of the board and, for a short time, president of WFE, and his concomitant *authority* to control the operations of WFE unrelated to waste disposal. The court of appeals erroneously concluded that "indirect control" supports the extension of liability, even where the undisputed evidence shows that the party being held liable as an "arranger" for the disposal of waste had neither knowledge of nor any involvement in the arrangement for disposal.

In sharp contrast to the holding of the court below, "arranger" liability under CERCLA requires an evidentiary showing of knowledge of or participation in waste disposal decisions. A corporate officer's role as the person in charge of day-to-day operations of the company, in and of itself, is insufficient to support "arranger" liability.

The recent decision of the Third Circuit in a CERCLA "transporter" case is instructive in this regard. In *United States v. USX Corp.*, 68 F.3d 811 (3d Cir. 1995), the court reviewed the CERCLA statutory scheme, compared transporter liability to various cases involving arranger liability and held:

> [W]e conclude that liability may not be imposed under § 107(a)(4) solely on the basis of an officer's or shareholder's active involvement in the corporation's day-to-day affairs. Instead, there must be a showing that the person sought to be held liable actually participated in the liability-creating conduct.

68 F.3d at 825. Although the instant case involves "arranger," rather than "transporter," liability, the same rationale applies. Here, there is no evidence that Georgoulis "actually participated in the liability-creating conduct," and, as a result, he is not an "arranger."

In *General Electric Co. v. AAMCO Transmissions, Inc.*, 962 F.2d 281 (2d Cir. 1992), the Second Circuit refused to impose arranger liability on a party that was not in any way involved in the disposal of the waste at issue. The court held that oil companies were not "arrangers" of their service station tenants' waste disposal, even if the companies had the ability or opportunity to control the disposal and exercised control over certain aspects of their tenants' business. *Id.* at 286-88. Noting that the oil companies had no knowledge concerning the disposal, the court said that "the mere existence of bargaining power" which would allow one party to control the actions of another does not render one liable under

CERCLA. *Id.* at 286. The court in *General Electric* rejected the proposition that the mere ability or authority to control waste disposal practices creates an obligation that renders a party liable as an arranger. *Id.* The decision of the court below in this case conflicts with the Second Circuit's ruling on this issue.

The decision in this case also conflicts with prior Eighth Circuit decisions addressing "arranger" liability. In *United States v. Vertac Chem. Corp.*, 841 F. Supp. 884 (E.D. Ark. 1993), *aff'd*, 46 F.3d 803 (8th Cir. 1995), *cert. denied*, 115 S.Ct. 2609 (1995), the Eighth Circuit affirmed the district court's ruling that, under the undisputed facts in that case, the United States could not be held liable as a matter of law as an "arranger" under CERCLA Section 107(a)(3) for the United States' involvement in the production of Agent Orange.[3] Resolution of the question of liability turned on the fact that the United States did not have direct responsibility for or immediately supervise the transportation or disposal of any hazardous waste. 46 F.3d at 810. The same is true with respect to Georgoulis. Thus, as evidenced by *Vertac*, even the Eighth Circuit recognizes that courts holding parties liable as "arrangers" have found that the party had some actual

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[3] The district court in *Vertac* specifically rejected any attempt to impose liability on the United States based merely on an "opportunity or ability to control," noting that other courts imposing "arranger" liability had found that the party had some actual involvement in the decision to dispose of the waste. *Id.* at 890.

involvement in the decision to dispose of the waste. It erred in departing from that rule in the case at bar.

The issue arises often in federal district courts, and these courts have likewise insisted upon more than mere "authority to control" before imposing "arranger" liability. For example, in *United States v. Arrowhead Ref. Co.*, 829 F. Supp. 1078 (D. Minn. 1992), the court held that the oil companies were not liable as arrangers under Section 107(a)(3) for hazardous substances sent to the Arrowhead site by Mobil service stations. *Id.* Citing *General Electric*, the court adopted the position that the mere ability or opportunity to control the disposition of hazardous waste does not make an entity liable as an arranger under CERCLA, and that the required nexus between an arranger and the waste must be "premised upon the *conduct* of the party in respect to the disposal of hazardous waste." *Id.* at 1091-95 (emphasis added). The district court granted summary judgment in favor of the oil companies. Similarly, Georgoulis was entitled to summary judgment in this case.

One does not become an "arranger" solely by virtue of a corporate title. The standard set forth in *General Electric* is the appropriate test for determining arranger liability under CERCLA. The ruling in this case conflicts with the Second Circuit's decision in this regard.

2. Personal knowledge or involvement is required.

Besides departing from other federal circuits' interpretation of "arranger" liability under CERCLA, the court below also departed from its own prior rulings on this

issue. In the case at bar, the Eighth Circuit relied on a statement, taken out of context, from its prior opinion in *United States v. Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987) ("*NEPACCO*"). Specifically, Georgoulis urged the court below to look beyond the isolated statement in *NEPACCO* that "[i]t is the authority to control the handling and disposal of hazardous substances that is critical under the statutory scheme." 68 F.3d at 1087 (citing *NEPACCO*, 810 F.2d at 743). This statement cannot be viewed in a vacuum.

In *NEPACCO*, the district court found that the company's vice president, shareholder, and plant supervisor was liable as an "arranger." That person, however, "actually knew about, had immediate supervision over, and was directly responsible for arranging for the transportation and disposal of the NEPACCO plant's hazardous substances." *NEPACCO*, 810 F.2d at 743. In contrast, the company president was *not* liable as an "arranger." Although he had supervised the construction of the plant, made frequent visits to the plant to check on operations, and participated in waste disposal decisions for another waste site, he "was not personally involved in the actual decision to transport and dispose of hazardous substances." *NEPACCO*, 810 F.2d at 745. In Georgoulis' case, the Eighth Circuit erroneously ignored its own requirement (recognized in *NEPACCO* and reaffirmed in *Vertac*) of intentional conduct as a prerequisite to imposition of arranger liability.[4]

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[4] In the instant case, the Eighth Circuit incorrectly stated that it "implicitly rejected a specific intent requirement" in

Other federal courts are in accord that personal participation or involvement is required for "arranger" liability. In *Analytical Measurements, Inc. v. Keuffel & Essel Co.*, 816 F. Supp. 291, 296-98 (D.N.J. 1993), the court analyzed several cases including *NEPACCO* and concluded that "very few federal courts have concluded that an officer 'personally participates' based solely on his position, authority or power in the corporation rather than his actual participation in the company's waste disposal process." In *Ashland Oil, Inc. v. Sonford Prod. Corp.*, 810 F. Supp. 1057, 1061 (D. Minn. 1993), the court cited *NEPACCO* as an example of a case requiring "some affirmative action on the part of the defendant in order for 'arranger' liability to attach" and imposed liability on a corporate officer who personally approved the disposal of hazardous waste. Similarly, in *New York v. Johnstown*, 701 F. Supp. 33, 36 (N.D.N.Y. 1988), the court cited *NEPACCO* as a case where the responsible party under

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United States v. Aceto Agric. Chems. Corp., 872 F.2d 1373 (8th Cir. 1989). Significantly, *Aceto* must be considered in its proper factual and procedural context. The case was before the court under the deferential standard applicable to a motion to dismiss. 872 F.2d at 1376. The *Aceto* court denied the defendants' motion to dismiss as to arranger liability. Both the district court and the Eighth Circuit held that the manufacturer of pesticides *could potentially* be held liable as an arranger where it arranged to have its product formulated and packaged into commercial grade pesticide, knowing that the generation of hazardous waste was inherent in the formulation process; however, the courts did not hold that the manufacturer *was* liable. 699 F. Supp. 1384, 1387-88; 872 F.2d at 1380-82. Moreover, a manufacturer of a substance such as a pesticide, which is hazardous in its own right, is quite different from a manufacturer of common farm equipment.

CERCLA § 107(a)(3) was someone "who decided how to dispose of its own waste." In *United States v. New Castle County*, 727 F. Supp. 854, 873-74 n. 43 (D. Del. 1989), the court summarized *NEPACCO* as imposing CERCLA § 107(a)(3) arranger liability on persons who actually control the disposal of hazardous substances as opposed to merely having the authority to control such disposal.

In addition, the Eleventh Circuit and an Illinois district court have specifically limited "arranger" liability to situations where the liable party participated in the waste disposal. In *Florida Power & Light Co. v. Allis Chalmers Corp.*, 893 F.2d 1313, 1317 (11th Cir. 1990), the court cited *NEPACCO* for the general proposition that a liberal interpretation of the term "arranged" is required to achieve "CERCLA's overwhelmingly remedial statutory scheme." In holding that the manufacturers involved were not liable as arrangers, however, the court said that whether an arrangement for disposal exists depends on the facts of each case and the evidence must indicate that a manufacturer otherwise arranged for disposal if it is to be held liable. *Florida Power*, 893 F.2d at 1317-18. Similarly, in *United States v. A&F Materials Co.*, 582 F. Supp. 842, 845 (S.D. Ill. 1984), the court stated, "Liability for releases under § 9607(a)(3) is not endless; it ends with that party who both owned the hazardous waste *and* made the crucial decision how it would be disposed of or treated, and by whom." (emphasis added).

Much of the confusion in this area comes from transactions involving the sale of a hazardous substance that is then disposed of. The person selling the substance argues that they arranged for a sale, not for a disposal. The courts have reviewed the facts to decide whether the

transaction was a sale or a disposal and, if the latter, have found liability as an arranger despite the person's intent. It is in these cases that courts say no showing of intent is necessary. The persons charged with liability focus on the words "for disposal" in the phrase "arrange for disposal." They say they did not intend to arrange *for disposal*. The courts, however, focus on the word "arrange." If the transaction was found a disposal, and the defendant was the one who *arranged* the transaction, then the defendant was liable whether or not it intended to arrange for disposal.

This is consistent with the Seventh Circuit's conclusion in *Amcast* that the words "arrange for disposal" imply intentional action. 2 F.3d at 751. In each of the "sale/disposal" cases, the person found liable did *something*. He did an intentional act. He *arranged* for a transaction that resulted in a disposal. In the Seventh Circuit's words, he was engaged in intentional action. *See, e.g., Chatham Steel Corp. v. Brown*, 858 F. Supp. 1130, 1142-43 (N.D. Fla. 1994) (defendants held liable as arrangers because they made the "crucial decision" to sell their used batteries for recycling); *California v. Verticare Inc.*, 1993 U.S. Dist. LEXIS 3062, *21 (N.D. Cal. Mar. 1, 1993) (court denied defendants' motion for summary judgment that they could not be held liable as arrangers where defendants "arranged" for the continued delivery of useful pesticides for use on crops to a site they knew was in disarray, and they did not always get back the expected amount of unused pesticide); *Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 781 F. Supp. 1448, 1451-52 (N.D. Cal. 1991), *clarified*, 781 F. Supp. 1452 (N.D. Cal. 1991) (court denied defendant chemical companies' motions for

summary judgment that they could not be held liable as arrangers where companies "arranged" for the formulation of DDT and the formulation process resulted in the disposal of hazardous substances where some DDT was allegedly lost or spilled into the environment); *United States v. Shaner*, 1990 U.S. Dist. LEXIS 8137, *13-15 (E.D. Pa. June 25, 1990) (defendant battery company "arranged" for disposal or treatment where it contracted with a third party to have its used batteries broken down and washed out and the scrap and sediment from the washing returned to defendant, where battery casings were disposed of by a third party and the process involved the risk that battery acid and washwater would be spilled onto the ground); *United States v. Aceto Agr. Chem. Corp.*, 699 F. Supp. 1384, 1387-88 (S.D. Iowa 1988), *aff'd in part, rev'd in part on other grounds*, 872 F.2d 1373, 1380-82 (8th Cir. 1989) (*"Aceto"*) (denial of defendants' motion to dismiss as to arranger liability affirmed and pesticide manufacturer found potentially liable where it "arranged" to have its product formulated and packaged into commercial grade pesticide, knowing that the generation of hazardous waste due to spills and cleaning of equipment was inherent in the formulation process). None of the sale/disposal cases resulted in a finding of liability where, as here, a defendant such as Georgoulis had no direct or personal involvement in arranging for the transaction that resulted in a disposal.

3. The court below ignored the distinction between "owners" and "arrangers"

Under the Eighth Circuit's opinion in this case, every company executive and parent company of a manufacturer of *any* type of product that results in the generation of waste is potentially directly and personally liable as an "arranger" for the disposal of waste. This is not the intention of CERCLA. If Congress had intended arranger liability to be identical to owner/operator liability, these two types of responsible parties would not have been separately listed under Section 107 of CERCLA.

An "arranger" is distinctly different from an "owner/operator" and different legal standards apply when determining liability. *Compare* Sections 107(a)(1) and 107(a)(2) with Section 107(a)(3). The Second Circuit expressly acknowledged that owners/operators and arrangers are two distinctly different types of parties under CERCLA and that "[t]he factors which make an owner or operator a responsible party do not apply with equal force in determining arranger liability." *General Elec. Co. v. AAMCO Transmissions, Inc.*, 962 F.2d 281, 287 (2d Cir. 1992). In this case, the court below failed to recognize this distinction. Indeed, it attempted to distinguish this case from *Vertac* on the facts, noting that the panel in *Vertac* found the United States' involvement in the waste facility at issue to be "sporadic and minimal" and that, as a result, there could be no *operator* liability. 68 F.3d at 1089 n.6. The point is that the requirements for imposing arranger liability are quite different from operator liability.

The Eighth Circuit itself recognized this distinction in *United States v. Gurley*, 43 F.3d 1188 (8th Cir. 1994), *cert. denied*, 116 S.Ct. 73 (1995). In *Gurley*, the court concluded that the "director of operations" of a facility that rerefined used motor oil was liable under CERCLA § 107(a)(2) as an "operator" because he both "had authority to determine GRC's hazardous waste disposal activities *and* that he actually exercised that authority." 43 F.3d at 1195 (emphasis added). Significantly, the *Gurley* case is an operator case, not an arranger case, and it delineates the different standards of proof for operator and arranger liability, making clear that intentional conduct is required for arranger liability.

CONCLUSION AND PRAYER FOR RELIEF

The decision of the court below contradicts the plain language of the CERCLA statute, which requires intentional action "by contract, agreement, or otherwise" to arrange for disposal of the corporation's wastes at the site as a condition of liability. CERCLA § 107(a)(3). The decision not only conflicts with the holdings and reasoning of other federal circuits and prior decisions of the Eighth Circuit, but also marks a departure from the statute by extending "arranger" liability under Section 107(a)(3) of CERCLA, 42 U.S.C. § 9607(a)(3), to an individual who undisputedly had no knowledge of, involvement with or participation in any of the waste disposal practices at issue.

The Eighth Circuit's decision will, if left undisturbed, erroneously extend virtually unlimited personal liability

to corporate officers and directors without regard for their lack of knowledge of or participation in waste disposal practices. The petition for certiorari should be granted.

Respectfully submitted,

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UNITED STATES of America, Allied Products Corporation, Appellees,

v.

TIC INVESTMENT CORPORATION, TIC United Corporation, and Stratton Georgoulis, Appellants.

No. 95-1035

United States Court of Appeals, Eighth Circuit.

Submitted June 14, 1995.

Decided Oct. 16, 1995.

Rehearing and Suggestion for Rehearing En Banc Denied Jan. 3, 1996.

McMILLIAN, Circuit Judge.

TIC Investment Corp. (TICI), TIC United Corp. (TICU), and Stratton Georgoulis (collectively defendants) appeal from two interlocutory orders entered in the United States District Court for the Northern District of Iowa, granting partial summary judgment in favor of Allied Products Corp. (Allied), *United States v. TIC Investment Corp.*, 866 F.Supp. 1173 (N.D.Iowa 1994), and the United States of America, *id.*, No. C91-2065 (Dec. 1, 1994), on the issue of defendants' potential liability as "arrangers" under § 107(a)(3) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9607(a)(3).[1] The district court

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[1] Section 9607(a)(3) provides in pertinent part: any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person . . . shall be liable for [response costs].

held that defendants were directly liable as arrangers under CERCLA in connection with the disposal of wastes containing hazardous substances produced by the White Farm Equipment Co. (WFE) during the years 1980 to 1985. Upon granting partial summary judgment on the issue of defendants' liability, the district court certified its orders for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). *United States v. TIC Investment Corp.*, No. C91-2065 (Nov. 30, 1994) (certifying order granting partial summary judgment for Allied); *id.* (Dec. 1, 1994) (certifying order granting partial summary judgment for the United States). For reversal, defendants argue that the district court erred in holding that (1) a corporate officer or director can be individually liable under CERCLA as an arranger of the disposal of hazardous substances without proof of any intentional participation in the arrangement for disposal of the hazardous substances and (2) a parent corporation can be liable as an arranger of the disposal of hazardous substances owned or possessed by the parent corporation's subsidiary without proof of any intentional participation by the parent corporation in the arrangement for disposal of the hazardous substances. For the reasons discussed below, we affirm in part and reverse in part and remand to the district court for further proceedings.

I. Background

The following summary of facts is largely taken from the district court's published opinion and order. 866 F.Supp. at 1175-77, 1180-81, 1183-84. From 1971 through 1985, WFE owned and operated a farm implement manufacturing plant in Charles City, Iowa. The WFE plant

produced wastes containing hazardous substances, which were disposed of at a nearby location (the dumpsite) which was owned by H.E. Construction Co. (HEC). During a period including the years 1980 to 1985, HEC transported WFE's wastes to the dumpsite, charging WFE on a per load basis. In 1979, WFE entered into a lease agreement with HEC whereby WFE leased the dumpsite from HEC for a two-year period in exchange for $1.00. After the lease expired, it was not renewed, but WFE continued to use the dumpsite for disposal of its wastes.

In November 1980, TICI purchased WFE out of the bankruptcy reorganization of WFE's then-parent corporation, White Motors Corp. At that time, and at all relevant times thereafter, Georgoulis was the sole shareholder, president, and chairman of the board of TICI. During the period from December 1980 through October 1985, the corporate structure was as follows. WFE was wholly owned by an investment holding company, White Farm U.S.A., Inc. (WF USA), which in turn was wholly owned by a holding company, White Farm Industries, Inc. (WFI). During approximately the first year of the relevant time period, WFI was wholly owned by TICI, a holding company. For the remaining four years, WFI was wholly owned by TICU, also a holding company. Georgoulis was, at all relevant times, the sole shareholder of TICI and TICU. TIC Services Co. (TIC Services), a subsidiary of TICI, provided various corporate services to TICI and TICU and their subsidiaries. These services included insurance, accounting, legal and tax work, and payment of employee salaries. During the years from 1980 to 1985, Georgoulis was, as previously noted, president and chairman of the board of TICI, president and chairman of the

board of TICU, and president and chairman of the board of TIC Services. (Hereinafter, TICI, TICU, and TIC Services are collectively referred to as the TIC entities.) Georgoulis was also chairman of the board of WFE, chairman of the board of WF USA, and chairman of the board of WFI. He was president of WFE for part of the five-year period in question. On two separate occasions, Georgoulis hired another person as WFE president; each served nominally for about one year before being fired by Georgoulis.

We assume, for purposes of this appeal, that neither Georgoulis nor any employee of the TIC entities had personal knowledge of the contract between WFE and HEC for the disposal of WFE's wastes at the dumpsite. Nor did Georgoulis or any employee of the TIC entities have any personal knowledge of the disposal practices at the dumpsite, or was in any way directly involved in waste disposal matters. However, it is beyond genuine dispute that, at all relevant times, Georgoulis had authority to control, and did in fact exert direct control over many significant aspects of the ongoing operations and management of WFE. Georgoulis, whose TICI and TICU offices were located in Dallas, Texas, was often present in WFE's corporate offices in Oakbrook, Illinois; at other times, Georgoulis talked daily, if not several times a day, with the WFE officers at the Oakbrook office. Georgoulis was directly involved in personnel matters including union contract negotiations, manpower reductions, pension benefits for nonunion WFE employees, and insurance benefits for WFE retirees. He had final authority over the areas of manpower and staffing at WFE. He also made the decision to close and consolidate some of WFE's

operations in other parts of the country. From 1980 to 1983, Georgoulis was not only the chairman of the board of WFE, he was also one of only two WFE board members, which ensured that no action of the board could take place without his approval.

It is also not genuinely disputed that an active working relationship existed between the parent corporations, TICI and TICU, and their subsidiary, WFE. For example, TICI and TICU management took part in lowering labor and personnel costs at WFE. One of the TIC holding companies guaranteed a $15 million working capital loan for WFE and arranged for WFE's lines of credit. TIC Services charged WFE a corporate fee for corporate services; for a portion of the relevant time period, TIC Services charged (but did not collect) a fee containing a 40% increase over WFE's proportional share. Also, for the years 1982 and 1983, TIC Services paid the salaries of the chief executive officer of WFE and billed WFE for reimbursement.

In 1983, the major lender for WFE, Borg-Warner Acceptance Corp. (BWAC), entered into a capital and revolving loan agreement for the refinancing of WFE and, at that time, required WFE to expand its Board of Directors to five members. However, even after that time, Georgoulis continued to serve on the board of directors and remained chairman of the board. WFE defaulted on its loan from BWAC in May 1985. Consequently, BWAC became owner of all of WFE's assets, which BWAC sold to Allied in October 1985.

In 1988, the United States Environmental Protection Agency placed the dumpsite on the National Priorities

List and began remediation at the site. *See* 42 U.S.C. § 9605(a)(8)(B); 40 C.F.R. Part 300, App. B (1993). The United States and Allied have each incurred response costs in connection with the remediation effort and each has brought a separate cost recovery action against defendants, pursuant to CERCLA, 42 U.S.C. § 9601 *et seq.* On cross-motions for summary judgment, the district court entered partial summary judgment holding that defendants were directly liable as arrangers of disposal at the dumpsite, within the meaning of § 9607(a)(3).[2] *United States v. TIC Investment Corp.*, 866 F.Supp. at 1178-84. Following the district court's certification under 28 U.S.C. § 1292(b), defendants appealed.

II. Discussion

A. *Summary judgment standard*

We review a grant of summary judgment *de novo*. The question before the district court, and this court on appeal, is whether the record, when viewed in the light most favorable to the non-moving party, shows that there is no genuine issue as to any material fact and that the

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[2] Because the district court did not reach the United States' alternative theory of derivative liability under the doctrine of piercing the corporate veil, we decline to express any opinion on that theory at this time. However, we note that this court has previously indicated, in dicta, that corporate veil-piercing may be appropriate where " 'the corporation is something less than a bona fide independent entity.' " *United States v. Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726, 744 (8th Cir.1986) (*NEPACCO*) (citing *Donsco, Inc. v. Casper Corp.*, 587 F.2d 602, 606 (3d Cir.1978)), *cert. denied*, 484 U.S. 848, 108 S.Ct. 146, 98 L.Ed.2d 102 (1987).

moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *see, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50, 106 S.Ct. 2505, 2510-11, 91 L.Ed.2d 202 (1986); *Get Away Club, Inc. v. Coleman*, 969 F.2d 664, 666 (8th Cir.1992); *St. Paul Fire & Marine Ins. Co. v. FDIC*, 968 F.2d 695, 699 (8th Cir.1992). Where the unresolved issues are primarily legal rather than factual, summary judgment is particularly appropriate. *Crain v. Board of Police Comm'rs*, 920 F.2d 1402, 1405-06 (8th Cir.1990).

B. *Arranger liability under CERCLA*

On this appeal, there is no dispute that the dumpsite is a facility within the meaning of CERCLA, that a release or threatened release of a hazardous substance from the dumpsite has occurred, and that the release or threatened release has caused the United States and Allied to incur response cots. 866 F.Supp. at 1177. The only disputed question on appeal is whether, as a matter of law, defendants fall within one of the four classes of responsible persons under 42 U.S.C. § 9607(a). *Id.* Generally speaking, the four categories of persons who are legally responsible under CERCLA for the cleanup of hazardous substances at a given facility are: (1) those who own and operate the facility at the time a release or threatened release exists; (2) those who owned or operated the facility at any time when hazardous substances were disposed of at the facility; (3) those who arranged for disposal or treatment, or arranged for transport for disposal or treatment, of hazardous substances which they owned or possessed; and (4) those who transported hazardous substances to the

facility. 42 U.S.C. § 9607(a). Our focus is on whether defendants fall within the third category of responsible persons described as "arrangers." Given the undisputed facts that WFE at all relevant times was wholly owned by either TICI or TICU, and that at all relevant times Georgoulis was the sole shareholder of TICI and TICU, there is no dispute that the hazardous substances disposed of at the dumpsite were owned by defendants. We need only decide whether or not defendants "arranged for" disposal of hazardous substances at the dumpsite during the years 1980 to 1985, within the meaning of CERCLA, 42 U.S.C. § 9607(a)(3).

There are several cases from our circuit in which arranger liability under 42 U.S.C. § 9607(a)(3) has been litigated. *See, e.g., United States v. Vertac Chem. Corp.*, 46 F.3d 803 (8th Cir. (*Vertac*), *cert. denied*, ___ U.S. ___, 115 S.Ct. 2609, 1132 L.Ed.2d 853 (1995); *United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373 (8th Cir.1989) (*Aceto*); and *United States v. Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726 (8th Cir.1986) (*NEPACCO*), *cert. denied*, 484 U.S. 848, 108 S.Ct. 146, 98 L. Ed.2d 102 (1987). Nevertheless, the precise issues before us, involving individual and corporate liability, have never been addressed. Upon careful *de novo* review, we agree with the district court's conclusion that Allied and the United States are entitled to summary judgment on the issue of Georgoulis's arranger liability as a corporate officer of WFE, although our reasons for reaching this conclusion differ from those of the district court. We disagree, however, with the district court's conclusion that Allied and the United States are entitled to summary judgment on the

issue of TICI and TICU's arranger liability as parent corporations of WFE.

C. *Arranger liability of Georgoulis as a corporate officer*

"CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3), imposes strict liability upon 'any person' who arranged for the disposal or transportation for disposal of hazardous substances. As defined by the statute, the term 'person' includes both individuals and corporations and does not exclude corporate officers or employees." *NEPACCO*, 810 F.2d at 743. Relying on *NEPACCO* and cases from other circuits, the district court held that the proper standard to be applied in assessing a corporate officer's potential liability as an arranger is the same as that which is used to determine operator liability under § 9607(a)(2), and that standard is an "authority to control" test. 866 F.Supp. at 1179. The district court added, however, that there must also be some "showing that the defendant actually exercised his or her authority" over the operations of the corporation; this additional requirement, the district court explained, "is to establish that the defendant was not a mere figurehead, and that he or she played more than a passive role in the corporation." *Id.* at 1180. The district court thus concluded in the present case that "[d]ue to Georgoulis' authority to control WFE and his actual exercise of control over WFE, he is directly liable as an arranger under CERCLA." *Id.* at 1181. The district court reached this conclusion notwithstanding the fact that there was no evidence that Georgoulis had any personal knowledge of WFE's waste disposal practices. *Id.* at 1176.

Defendants argue that the case law makes an important distinction between, on the one hand, the strict liability that attaches once a person is found to be within one of the four categories of responsible persons under CERCLA and, on the other hand, the intent requirement that necessarily underlies a finding that a person is within one of those categories. For a person to be classified as an arranger, defendants argue, the law requires that the person "take[] some intentional action to arrange for disposal of a hazardous substance." Brief for Appellants at 9 (citing *Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746, 751 (7th Cir.1993) (*Amcast*) ("The words imply intentional action."), *cert. denied*, ___ U.S. ___, 114 S.Ct. 691, 126 L.Ed.2d 658 (1994)).[3] Defendants maintain that they did not engage in intentional action in the present case because neither Georgoulis nor any employees of the TIC entities had any personal knowledge of the HEC disposal contract or the disposal practices at the dumpsite, nor did they actively participate in any waste disposal decisions.

Addressing cases from this circuit, defendants suggest that this court should not rely on the literal meaning of the following isolated sentence from *NEPACCO*: "It is

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[3] Upon a careful reading of *Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746 (7th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 691, 126 L.Ed.2d 658 (1994), we find that it does not support defendants' position here because, in that case, the Seventh Circuit reasoned that arranger liability did not exist where there was *no arrangement*. *Id.* at 751 (where disposal occurred as a result of an accidental spill by a transporter, the person that hired the transporter did not "arrange for" the disposal.) In the present case, however, it is undisputed that there was an arrangement for HEC to dispose of WFE's wastes at the dumpsite.

the authority to control the handling and disposal of hazardous substances that is critical under the statutory scheme." 810 F.2d at 743. Defendants argue that *NEPACCO*, on its facts, is clearly distinguishable from the case at bar because the employee in *NEPACCO*, who was found to be liable as an arranger, "actually knew about, had immediate supervision over, and was directly responsible for arranging for the transportation and disposal of the NEPACCO plant's hazardous substances." *Id.* Moreover, defendants argue, since *NEPACCO*, this court has specifically held that the mere authority to control disposal or treatment does not, in and of itself, establish arranger liability. *Vertac*, 46 F.3d at 810 (mere authority to control disposal activities does not create arranger liability; "[o]ur holding in *NEPACCO*, when read in the context of the facts of the case, certainly does not suggest such a broad interpretation"). Defendants also argue that the district court's interpretation of *NEPACCO* is inappropriate in light of *United States v. Gurley*, 43 F.3d 1188 (8th Cir.1994) (*Gurley*) (affirming finding that individual employee was liable as an operator under 42 U.S.C. § 9607(a)(2)), *cert. denied*, ___ U.S. ___, 116 S.Ct. 73, 133 L.Ed.2d 33 (1995). In *Gurley*, this court commented:

> an individual may not be held liable as an "operator" under § 9607(a)(2) unless he or she (1) had authority to determine whether hazardous wastes would be disposed of and to determine the method of disposal and (2) actually exercised that authority, either by personally performing the tasks necessary to dispose of the hazardous wastes or by directing others to perform those tasks.

43 F.3d at 1193. In *Gurley*, this court further described its statement of the law on individual operator liability as "faithful to our closely analogous decision in *NEPACCO*." *Id.* Finally, defendants argue that *Aceto* is inapplicable to the present case. Defendants argue that *Aceto* falls within a line of cases in which the controlling issue involved whether the object of a putative arrangement was either a disposal or a sale (or some other use) of the materials containing hazardous substances. By contrast, defendants argue, the issue here is whether they ever intentionally participated in any arrangement.

We agree with defendants' argument that, in the wake of *Gurley* and *Vertac*, a finding of arranger liability requires some level of actual participation in, or exercise of control over, activities that are casually connected to, or have some nexus with,[4] the arrangement for disposal of hazardous substances or the off-site disposal itself. Defendants have taken this proposition one step further, however, by arguing that, as a matter of law, arranger liability requires proof that the person had the specific

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[4] Based upon this notion of a "nexus," some courts have recognized that arranger liability can be established, absent any active involvement related to the disposal or arrangement for disposal of hazardous substances, where the defendant had the *obligation* to exercise control over the disposal or arrangement for disposal of hazardous substances. *Cf. General Elec. Co. v. AAMCO Transmissions, Inc.*, 962 F.2d 281, 286-87 (2d Cir.1992) (affirming summary judgment in favor of defendant oil companies on issue of their potential arranger liability where "the undisputed facts demonstrate[d] that the oil companies had no obligation to exercise control over the manner in which their dealers disposed of waste motor oil").

intent to arrange for the disposal of hazardous substances. If this were the proper standard, the district court's summary judgment disposition would be improper because the United States and Allied were unable to adduce any evidence showing that defendants ever participated in, or had any knowledge of, the arrangement for disposal of WFE's hazardous wastes at the dumpsite. We reject defendants' specific intent argument for the following reasons.

As noted by the district court, Congress's goals in enacting CERCLA were "(1) to ensure that those responsible for the problems caused by hazardous wastes are required to pay for the clean-up costs . . . and (2) to ensure that responsible persons are not allowed to avoid liability by remaining idle." 866 F.Supp. at 1177 (citations omitted). Consistent with these goals, this court in *Aceto* rejected the notion that generators of hazardous substances could simply "close their eyes" to the method of disposal of their hazardous substances to avoid any liability for response costs. 872 F.2d at 1382. Contrary to defendants' assertions, *Aceto* undermines their legal argument. The defendants in *Aceto* argued that the allegations in the complaint were insufficient to state a claim under § 9607(a)(3), where the defendants had allegedly contracted to have another party "formulate," rather than "dispose of," technical grade pesticides containing hazardous substances. 872 F.2d at 1379. This court was persuaded by the argument that the defendants knew or should have known that "because the generation of pesticide-containing wastes is inherent in the pesticide formulation process, Aidex [the party with which the defendants contracted] could not formulate defendants' pesticides

without wasting and disposing of some portion of them." *Id.* at 1379. Thus, this court implicitly rejected a specific intent requirement and held that the complaint adequately alleged that the defendants had arranged for disposal of hazardous substances. *Id.* at 1181.

Similarly, upon a careful reading of *Gurley*, we find that this court's decision in that case supports the district court's finding of Georgoulis's liability as an arranger in the present case. As noted above, this court held, in *Gurley*, that a particular individual employee was liable as an operator under CERCLA, 42 U.S.C. § 9607(a)(2), because that individual (1) had the authority to determine whether hazardous wastes would be disposed of and the method of disposal and (2) actually exercised that authority, either by personally performing the tasks necessary to dispose of the hazardous wastes or by directing others to perform those tasks. 43 F.3d at 1193. Notably, that individual in *Gurley* was a non-officer, non-director, non-shareholder employee. *Id.* at 1194. The holding in *Gurley* must be viewed in this context.[5] Indeed, in

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[5] We also note that the finding of individual liability in *United States v. Gurley*, 43 F.3d 1188 (8th Cir.1994) (*Gurley*), *cert. denied*, ___ U.S. ___, 116 S.Ct. 73, 133 L.Ed.2d 33 (1995), was based upon the fact that the appellant had himself personally participated in the disposal activities at the facility in question, which was a borrow pit used for disposal of wastes containing hazardous substances. The court therefore was not faced with the issue of whether, or under what circumstances, an individual could be found personally liable in the absence of any personal participation in the disposal activities. Clearly, the standard mentioned in *Gurley* would not apply generally in all individual operator liability cases. For example, it might not apply where the primary function of the facility at the time of

attempting to define the outer limits of individual operator liability for mere employees, this court specifically recognized that "[p]erhaps persons who are officers, directors, or shareholders are more likely to cause a company to dispose of hazardous wastes." *Id.* Nevertheless, defendants now urge us to take language from *Gurley* out of context to conclude that Georgoulis cannot be personally liable as an arranger absent proof of his personal

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disposal was manufacturing, rather than disposal. *Compare United States v. Vertac Chem. Corp.*, 46 F.3d 803, 806-07 (8th Cir.) (*Vertac*), *cert. denied*, ___ U.S. ___, 115 S.Ct. 2609, 132 L.Ed.2d 853 (1995) (at time of disposal, facility was a plant where Agent Orange was manufactured) *with Gurley*, 43 F.3d at 1190 (at time of disposal, facility was a borrow pit used primarily for waste disposal). The relevant owner and operator provision of CERCLA provides in pertinent part:

> any person who at the time of disposal of any hazardous substance *owned or operated any facility at which such hazardous substances were disposed of* . . . shall be liable for [response costs.]

42 U.S.C. § 9607(a)(2) (emphasis added).

This provision in CERCLA merely requires that the person in question own or operate the facility at which hazardous substances are disposed of, at the time of disposal; nowhere does this subsection require that the person be involved in the disposal activities themselves. Likewise, as the case parentheticals in *Gurley* indicate, *see* 43 F.3d at 1193, the courts which have held that the actual exercise of authority is a requirement of operator liability have recognized that it is sufficient for the person to have exercised authority or control over the *operations* of the facility. Consistent with the plain meaning of the § 9607(a)(2), none have *required* the person to have exercised authority or control over the disposal activities, although such conduct would, in most instances, satisfy the "actual control" requirement.

involvement in the arrangement for disposal, notwithstanding the facts that he was an officer, director, and shareholder and that he had the authority to control – and did in fact control – practically every major aspect of WFE's operations. From a policy standpoint, such a holding would violate the goals underlying CERCLA by creating a loophole for powerful individuals like Georgoulis. A corporate officer, who has virtually unlimited control over a company and in fact exercises that control but knows well enough to close his or her eyes to the specific details of the company's hazardous waste disposal practices, could avoid CERCLA liability; meanwhile, the employee charged with the job of actually carrying out the disposal activities or making the disposal arrangements – even if he or she has no meaningful decisionmaking authority – could *not* avoid personal liability. "CERCLA places the ultimate responsibility for clean up on 'those *responsible* for problems caused by the disposal of chemical poisons.' " *Aceto*, 872 F.2d at 1377 (emphasis added) (citing *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir.1986)).[6]

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[6] We also note that under the analysis in *Vertac*, 46 F.3d at 807-09, Georgoulis's level of control over the operations of WFE would have been enough to establish his operator liability if the disposal had occurred on WFE's own property. In *Vertac*, this could held that the United States was not an operator because it did not actually or substantially exercise control over the operations or affairs of the facility where hazardous wastes had been disposed. *Id.* at 811 ("the United States' actual involvement in the operations of the Jacksonville facility was sporadic and minimal"). By contrast, Georgoulis was regularly and substantially involved in virtually every aspect of the operations at the WFE site. The facts that WFE shipped its

Therefore, based upon our understanding of CERCLA, and our interpretation of the case law from our circuit, we hold that arranger liability under § 9607(a)(3) does not impose the specific intent requirement urged by defendants. We agree with the United States' argument that defendants' proposed specific intent standard would

> insulate[ ] from liability those who own and intrusively run organizations, those who effectively dictate their hazardous waste decisions through day-to-day strict control of budgets, production, and capital investment, those who strip the company of its cash and its independent decision-making, but who do not trouble themselves with the cost-cutting disposal practices of their company.

Brief for Appellee United States at 36.

We now hold that the proper standard to be applied in this case imposes direct arranger liability on a corporate officer or director if he or she had the authority to control and did in fact exercise actual or substantial control, directly or indirectly, over the arrangement for disposal, or the off-site disposal, of hazardous substances. We part company with the district court in interpreting § 9607(a)(3) insofar as the district court held "[w]hether an individual chooses to exercise all the authority he or she has over a corporation is *not* relevant under the statutory scheme as one purpose of CERCLA is to encourage those individuals with the power to do so, to take

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hazardous substances off-site and Georgoulis turned a blind eye to the specific details of the disposal arrangement should not, in this instance, shield him from liability.

action to abate the damage caused by hazardous waste disposal." 866 F.Supp. at 1180 (emphasis added). Our holding today recognizes that, for purposes of determining arranger liability under § 9607(a)(3), whether an individual exercises his or her authority over a corporation which generates and arranges for the disposal, treatment, or transportation of hazardous substances, *is* relevant under the statutory scheme. For arranger liability to attach to a corporate officer or director, there must be some actual exercise of control, *and* it must include the exercise of some control, directly or indirectly, over the arrangement for disposal, or the of-site disposal, of hazardous substances.[7] By adopting this stricter standard, our holding today dispels defendants' argument that

> it can legitimately be said that every chief executive officer of every corporation has the ultimate authority to control every matter in the corporation. In actual practice, however, corporate decision making involves delegation of authority and reliance on the judgment of others. The effect of the District Court's Order is

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[7] This standard differs from the standard for finding operator liability arising out of the exercise of control by one entity over another. To establish arranger liability, the exercise of control must be causally related to the arrangement for disposal, or the off-site disposal, rather than merely the operations or activities of the ostensible arranger. The language of CERCLA's arranger subsection specifically requires that one arrange for disposal or treatment, or arrange for transportation for disposal or treatment. 42 U.S.C. § 9607(a)(3). The language related to operator liability, by contrast, merely requires that one operate the facility at which hazardous substances are disposed of, at the time of the disposal; it does not require any involvement in the disposal activities themselves. 42 U.S.C. § 9607(a)(2).

> that any officer of a corporation who has contract authority can be held liable as a person who "arranged for disposal" of that corporation's waste.

Brief for Appellants at 14 n. 4.

In the present case the undisputed facts reveal that Georgoulis did not simply delegate authority and rely on the judgment of others; as a practical matter, his mandates left no room for others to exercise any decisionmaking authority or judgment in any area of the business, including hazardous waste disposal. Had Georgoulis truly delegated authority to others and allowed those individuals to exercise their judgment with respect to WFE's waste disposal practices without his interference, he would not be liable as an arranger under the standard we have adopted today. In the present case, however, the undisputed facts show that Georgoulis had the authority to control virtually every aspect of WFE's operations and did in fact directly control many aspects of WFE's operations and indirectly control others. We find it beyond dispute that Georgoulis, in his capacity as board chairman and chief executive officer of WFE, so usurped the power of those who were only nominally running WFE that he undertook responsibility for all of WFE's decisionmaking; he so tightly controlled WFE, particularly its budgetary aspects, that he left WFE employees no other choice but to continue with the relatively inexpensive arrangement that had historically existed between WFE and HEC.[8] In other words, Georgoulis's actions

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[8] We think these facts are abundantly clear based upon our review of the affidavits and depositions in the record which

inexorably led to the continuation of the disposal of WFE's wastes at the dumpsite. It is therefore beyond genuine dispute that he exercised substantial indirect control over the disposal arrangement. We base this conclusion upon a fact-intensive examination of the totality of the circumstances. *Cf. Vertac*, 46 F.3d at 808 (actual control test for determining operator liability "requires a fact-intensive inquiry and consideration of the totality of circumstances"). The lack of evidence showing that Georgoulis was personally involved in, or aware of, the details of the disposal arrangement does not bar his liability.

Thus, upon *de novo* review, we hold that the district court did not err in holding as a matter of law that Georgoulis was an arranger under CERCLA, 42 U.S.C. § 9607(a)(3). Accordingly, we affirm the ruling of the district court granting summary judgment on this issue.

D. *Arranger liability of TICI and TICU as parent corporations*

On the issue of TICI and TICU's arranger liability as corporate parents of WFE, the district court held

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contain unequivocal statements by former WFE employees demonstrating that (1) Georgoulis completely dominated all of the decisionmaking at WFE and did not delegate any decisionmaking responsibility to others, (2) his WFE employees were under strict instructions not to increase WFE's costs and to do everything possible to reduce costs across the board, and (3) when they did not do exactly what Georgoulis expected, he terminated them. *See, e.g.*, Joint Appendix, Vol. IV at 772, 775-79, 783, 786, 789 (deposition of Emerson P. Barrett); Vol. VII at 1594, 1596-1600 (deposition of David Finatri); Vol. VII at 1603, Vol. XIII at 3218 (deposition of Robert Fuller); Vol. VII at 1605-07 (declaration of Robert Fuller).

"CERCLA policy dictates a finding of liability where the parent has gone beyond an investment relationship with the subsidiary and has exerted actual control over the subsidiary's activities." 866 F.Supp. at 1182. The district court reasoned:

> This court finds it appropriate to use case law discussing parent corporation liability as an operator to determine liability as an arranger. Where as here, the question of liability concerns a corporation which is producing the hazardous waste and disposing of it off corporate property, this court finds that it would open a wide hole in CERCLA law should such a corporation be treated differently than a corporation which disposed of its hazardous waste on its own property. The use of the "actual control" test, to also assess arranger liability, ensures that a parent corporation who is active within certain areas of its subsidiary's activities is not encouraged to ignore the hazardous waste practices of the subsidiary.

Id. Based upon this reasoning, the district court concluded that the test for parent liability used in operator cases should apply equally in arranger cases. We disagree.

We reject the district court's conclusion that the standard for determining whether a parent corporation is liable as an operator applies equally when considering arranger liability because the statutory requirements for each of these two classifications under CERCLA (i.e., operators and arrangers) are significantly different. In other words, the statute itself sets forth different requirements with respect to operator liability and arranger

liability, *see* note 7 *supra*, which must be carefully considered in this context. The critical distinction between operator liability under § 9607(a)(2) and arranger liability under § 9607(a)(3), for purposes of this parent corporation liability analysis, is that subsection (a)(2) requires only that the person operate the facility where disposal occurs at the time of the disposal; by contrast, subsection (a)(3) requires that the person arrange for the disposal, treatment, or transportation for disposal or treatment. Therefore, while a parent corporation need only have the authority to control, and exercise actual or substantial control, over the operations of its subsidiary to incur direct operator liability for the subsidiary's onsite disposal practices,[9] we believe that, in order for a parent

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[9] When discussing the standard for liability under the operator provision in § 9607(a)(2), we have indicated, by analogy, that a parent corporation may be directly liable for activities carried out ostensibly by its subsidiary if the parent corporation, in effect, actually operated the subsidiary's facility by having the authority to control and actually or substantially controlling the facility at which the disposal occurred, at the time of the disposal. *Cf. Vertac*, 46 F.3d at 807-09 (United States not liable as operator of government contractor where it "was not sufficiently involved, directly or indirectly, in the activities that took place at the Jacksonville facility to constitute actual or substantial control"). Several other circuits which have addressed the issue in the corporate context have adopted a similar standard. *See Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 1221-22 & n. 13 (3d Cir.1993) (adopting actual control standard for operator liability; corporations are accountable when they are not mere investors in other corporations, but instead have actively and substantially participated in the affiliated corporation's management); *Jacksonville Elec. Auth. v. Bernuth Corp.*, 996 F.2d 1107, 1110 (11th Cir.1993) (requiring actual and pervasive control of subsidiary;

corporation to incur direct arranger liability for a subsidiary's off-site disposal practices, there must be some causal connection or nexus between the parent corporation's conduct and the subsidiary's arrangement for disposal, or the off-site disposal itself.[10]

We therefore hold that the standard to be applied in this case imposes direct arranger liability on a parent corporation if the parent had the authority to control and

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actual involvement in decisions regarding the disposal of hazardous substances is sufficient but not necessary to satisfy this requirement); *United States v. Kayser-Roth Corp.*, 910 F.2d 24, 26-27 (1st Cir.1990) (corporate parent operator liability requires more than ownership and authority or ability to control; it also requires active involvement in the activities of the subsidiary), *cert. denied*, 498 U.S. 1084, 111 S.Ct. 957, 112 L.Ed.2d 1045 (1991). Two minority views which have been expressed by other circuits in the context of considering operator liability of a parent corporation include (1) that mere authority to control is sufficient to establish liability, *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 842 (4th Cir.) (authority to control, not actual control, is the appropriate standard; actual conduct is evidence of authority to control but not a legal requirement), *cert. denied*, ___ U.S. ___, 113 S.Ct. 377, 121 L.Ed.2d 288 (1992); and (2) that liability can be established only if the requirements for piercing the corporate veil have been met, *United States v. Cordova Chem. Co.*, 59 F.3d 584, 590-91 (6th Cir.1995) ("a parent corporation incurs operator liability pursuant to section 107(a)(2) of CERCLA, for the conduct of its subsidiary corporation, only when the requirements necessary to pierce the corporate veil are met"); *Joslyn Mfg. v. T.L.James & Co.*, 893 F.2d 80, 83 (5th Cir.1990) (same), *cert. denied*, 498 U.S. 1108, 111 S.Ct. 1017, 112 L.Ed.2d 1098 (1991).

[10] There may be some instances where arranger liability arises as a result of the parent corporation's *obligation* to exercise control over the disposal or arrangement for disposal of hazardous substances. *See* note 4 *supra*.

exercised actual or substantial control, directly or indirectly, over the arrangement for disposal, or the off-site disposal, of the subsidiary's hazardous substances. As indicated above with respect to individual arranger liability, application of this standard requires a fact-intensive inquiry, based upon the totality of the circumstances. *Cf. Vertac*, 46 F.3d at 808 (referring to governmental operator liability); *accord Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 1220-22 (3d Cir.1993) (referring to corporate operator liability).

Turning to the facts of the present case, we note that the district court, in determining that TICI and TICU were liable as arrangers stated "[a]ll of Georgoulis' involvement in WFE . . . is applicable to determining parent corporation involvement as Georgoulis was president and chairman of the board of directors for both TICI and TICU." 866 F.Supp. at 1183. Based upon the record before us, we do not find that a sufficient factual basis exists to support this assumption at this stage of the litigation. While we agree that it is beyond genuine dispute that Georgoulis had the authority to control every aspect of WFE's operations, and did in fact directly or indirectly control virtually every aspect of WFE's operations including the arrangement for disposal of its hazardous wastes, it is not clear from the record that he did so *in his capacity as an officer or director of TICI or TICU*. In fact, the district court's factual basis for holding Georgoulis personally liable, which we will not reiterate here, focuses almost exclusively on Georgoulis's involvement in WFE's affairs *in his capacity as sole stockholder, president, and chairman of the board of WFE*. *See* 866 F.Supp. at

1180-81. The mere fact that Georgoulis and other individuals who were officers and directors for TICI and TICU concurrently served as officers and directors for WFE, *id.* at 1183-84, does not, in and of itself, tend to establish TICI or TICU's liability. We are thus left to evaluate only those facts relevant to the actual working relationship between the parent corporations, TICI and TICU, and their subsidiary, WFE. Along these lines, the district court noted the following facts: one of the TIC holding companies guaranteed a $15 million working capital loan for WFE and arranged for WFE's lines of credit; the TIC entities charged WFE a corporate fee for corporate services and, for a portion of the relevant time period, this fee contained a 40% increase over WFE's proportional share; TIC Services paid the salaries of the chief executive officer of WFE in 1982 and 1983 and billed WFE for reimbursement; and TICI and TICU filed consolidated tax returns for December 1981 through 1985 which included WFE's finances. 866 F.Supp. at 1176, 1184. However, based upon these facts and our independent review of the record, we cannot say that there is no genuine issue as to whether TICI and TICU exercised actual or substantial control, directly or indirectly, over WFE's waste disposal arrangement with HEC.

Thus, upon *de novo* review in the present case, we hold that the record fails to establish that there are no genuine issues of material fact and that the United States and Allied are entitled to judgment as a matter of law on the issue of TICI and TICU's liability as arrangers under CERCLA, 42 U.S.C. § 9607(a)(3), in their capacity as parent corporations of WFE. Accordingly, we reverse the

ruling of the district court granting summary judgment on this issue.

III. Conclusion

For the foregoing reasons, we hold that Allied and the United States are entitled to summary judgment on the issue of Georgoulis's arranger liability as a corporate officer of WFE. We further hold that Allied and the United States are not presently entitled to summary judgment on the issue of TICI and TICU's arranger liability as parent corporations of WFE. Thus, the orders of the district court are affirmed in part and reversed in part, and the case is remanded to the district court for further proceedings consistent with this opinion.

UNITED STATES of America, Plaintiff

v.

TIC INVESTMENT CORP., TIC United Corp., Stratton Georgoulis, Defendants.

ALLIED PRODUCTS CORP., Plaintiff,

v.

TIC INVESTMENT CORP., TIC United Corp., Stratton Georgoulis, Defendants.

No. C91-2065

United States District Court,
N.D. Iowa, Eastern Division.

Sept. 19, 1994.

OPINION and ORDER

MELLOY, Chief Judge.

This matter is before the court on cross motions for summary judgment as to defendants liability under § 107(a) of CERCLA, 42 U.S.C. 9607(a). Considered within this opinion and order are Defendants' Motion for Partial Summary Judgment Against USA and for Summary Judgment Against Allied (Document Number 80), filed October 21, 1993; the United States' Motion for Partial Summary Judgment on Liability under Section 107 of CERCLA, (Document Number 92), filed October 22, 1993; and Allied's Motion for Partial Summary Judgment Against Defendants (Document Number 95), filed October 22, 1993. This order denies defendants' motion for summary judgment in part and declines to rule in part,

grants Allied Products Corp.'s motion for summary judgment in part, denies it in part and declines to rule in part, and declines to rule on the United States' motion for summary judgment.

Background

White Farm Equipment Company (WFE) owned and operated a farm implement manufacturing plant in Charles City, Iowa from 1971 through 1985. The Charles City manufacturing facility was one of several WFE operating locations in the United States, all of which reported to WFE headquarters in Oak Brook, Illinois. Beginning in 1971 and continuing to the present, the waste from the Charles City plant has been disposed of at a disposal site (dumpsite) owned by H.E. Construction Co. H.E. Construction transported WFE's foundry waste to the property and disposed of it there, charging WFE on a per load basis.

In 1979, WFE signed a lease agreement with H.E. Construction in which WFE leased the dumpsite for a two year period, for $1.00. After this lease expired, no new lease was executed, but WFE continued to utilize the dumpsite for disposal of its waste.

In December 1980, White Farm U.S.A., Inc., an investment holding company, became the sold holder of WFE stock when the stock was purchased from White Motor Corporation pursuant to an order from a United States Bankruptcy Court. From December 1980 through October 1985, WFE was wholly owned by White Farm U.S.A. which in turn was wholly owned by White Farm Industries, Inc. TIC Investment Corp. (TICI) wholly owned

White Farm Industries from December 1980 through December 1981 at which time TIC United (TICU) took over ownership of White Farm Industries. Defendant Stratton Georgoulis was the sole shareholder of TICI and TICU during the periods each separately owned WFE. The corporations, excepting WFE, are all holding companies. The employees were all paid through TIC Services Co., which provided corporate services to all TICI and TICU's subsidiaries.

There is no evidence that Georgoulis or any employee of TIC Services had personal knowledge of the Charles City plant's waste disposal practices or that they participated in any way with waste disposal decisions of any of the subsidiary corporations. It is disputed whether Georgoulis or any employee of TIC Services had knowledge of the lease with H.E. Construction.

TIC Services, a subsidiary of TICI, provided services to WFE and all other TIC subsidiaries which included insurance, accounting, legal and tax services. Each subsidiary was billed a corporate charge for these services. TIC Services initially calculated the fee to be charged by totaling its indirect costs and dividing the cost among the subsidiaries in proportion with each subsidiary's total sales. Prior to 1983, TIC Services would then diverge from this formula and assess WFE a lower proportion of the costs. In 1983 TIC Services added 40% to WFE's proportional share of the corporate fee. However, in May of 1983, WFE was refinanced by Borg-Warner Acceptance Corporation (BWAC) and BWAC imposed limitations on the corporate fee that TIC Services Co. could charge; consequently the additional 40% TIC Services had intended to charge was never collected. TIC Services also

paid the salaries of the chief executive officer of WFE in 1982 and 1983 and billed WFE for reimbursement until BWAC insisted that this practice be curtailed.

Stratton Geourgoulis was the president of WFE from December 19, 1980 to November 23, 1981. From May 1, 1980 through March 27, 1985, he was Chairman of the corporate boards of the following corporations: WFE, White Farm U.S.A., White Farm Industries, Inc., TIC Services Co., and TICI. Geourgoulis was also president of TIC Services, Co. and TICI from May 1980 to March 1985 and president and Chairman of the Board of TICU from the time it was formed through March of 1985.

From TICI's acquisition of WFE until 1983, WFE's Board consisted of two persons, Stratton Geourgoulis and Dean Marcy, Vice President of Finance of TIC Services.

Borg-Warner Acceptance Corporation (BWAC) the major lender for WFE, and White Farms U.S.A. entered into a capital and revolving loan agreement in May 1983 for the refinancing of WFE. Under this $15 million agreement, WFE was required to expand its Board of Directors to five members. BWAC and White Farm U.S.A. were to nominate one member each and together the two corporations were to choose three neutral nominees to the Board. Pursuant to this agreement, Geourgoulis remained on the Board as White Farm's nominee through March of 1985 and Dean Marcy remained on the Board as a neutral nominee until his resignation in 1984. The remaining positions on the Board were filled by various other persons.

WFE defaulted on its loan agreement with BWAC in May 1985. BWAC, as priority lienholder of WFE's assets,

became the owner of all WFE assets at this time. BWAC sold WFE's assets to Allied in October 1985.

The United States and Allied brought separate actions against the defendants for recovery of response costs under § 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended by the Superfund Amendments and Reauthorization Act of 1986, 42 U.S.C. § 9607 for cleanup costs incurred at the WFE dumpsite. On February 12, 1993 this court consolidated the separate actions.

CERCLA Liability

The recognized purposes of CERCLA legislation are (1) to ensure that those responsible for the problems caused by hazardous wastes are required to pay for the clean-up costs, *U.S. v. Maurice M. Taylor, Sr., et al.*, 1993 U.S.Dist. LEXIS 19082 (W.D.MICH. Dec. 9, 1993) and (2) to ensure that responsible persons are not allowed to avoid liability by remaining idle. *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 845 (4th Cir.1992).

An individual is liable to another for response costs under CERCLA § 107(a), 42 U.S.C. § 9607(a) if:

(1) the site in question is a "facility" as defined in § 101(9), 42 U.S.C. § 9601(9);

(2) a "release" or "threatened release" of a hazardous substance from the site has occurred;

(3) the release or threatened release has caused response costs consistent with the National Oil and Hazardous Substances Pollution Contingency Plan to be incurred; and

(4) the defendant is a responsible person under § 107(a)(1)-(4).

In this action, the "facility" is the WFE dumpsite owned by H.E. Construction. The parties are not disputing the existence of the first three elements, however, they do dispute whether the defendants are responsible persons under CERCLA. To be a responsible person under CERCLA, a defendant must fall within one of the following categories of persons:

(1) an owner and operator of a facility at which a release or threatened release of hazardous substances exists;

(2) an owner or operator of such a facility at any time when hazardous substances were disposed of on the facility;

(3) any person or entity who "arranged for" the treatment or disposal of a hazardous substance at the facility; and

(4) any person who transports hazardous substances to the facility. *United States v. Aceto Agricultural Chemicals Corp.*, 872 F.2d 1373, 1377 (8th Cir.1989) (hereinafter *"Aceto);* 42 U.S.C. § 9607(a).

The United States has sued the defendants under § 107(a)(3) of CERCLA claiming liability of the defendants as arrangers because of the improper disposal of WFE waste at the H.E. Construction dumpsite. The United States asserts liability against each defendant directly and derivatively based on the common law doctrine of "piercing the corporate veil." Allied has sued the defendants under CERCLA for response costs it claims it

has incurred in connection with cleaning up the dumpsite. Allied asserts the defendants are liable under § 107(a)(2) as owners and operators of the dumpsite, and under § 107(a)(3) as arrangers, and under both of these sections through the common law theory of "piercing the corporate veil." The United States has asked for summary judgment only in relation to its claim that the defendants are derivatively liable on the theory of piercing the corporate veil. Allied has asked for summary judgment on each of its theories of liability and the defendants ask for summary judgment that it is not liable under either §§ 107(a)(2) or (3), either directly or derivatively through piercing the corporate veil. Because this court finds the defendants are directly liable under § 107(a)(3) as an arranger, this court declines to rule on the defendants' possible liability through piercing the corporate veil.

Summary Judgment

Summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." *Robinson v. Monaghan*, 864 F.2d 622, 624 (8th Cir.1989) (quoting Fed.R.Civ.P. 56(c)). Once the motion for summary judgment is made and supported, it places an affirmative burden on the non-moving party to go beyond the pleadings and "by affidavit or otherwise" designate "specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986).

Owner-Operator Liability

Allied moves for summary judgment against the defendants as owners and operators of the dumpsite asserting defendants, through WFE's lease of the site, "owned and operated" it. Defendants make a cross motion for summary judgment asserting that WFE cannot be considered an owner as it never held legal title to the dumpsite and, it cannot be considered an operator as H.E. Construction maintained control of the property.

WFE leased the land specifically as "a dumping ground for disposing of its casting facility's solid waste material." *Lease between H.E. Construction Co., Inc. and WFE*, dated May 16, 1979. The lease was for two years and ran from June 1979 to June 1981. The lease stated that H.E. Construction remained "the owner in possession and control" of the property. Although the lease was not renewed, WFE continued to use the dumpsite throughout TICI and TICU's ownership of WFE.

Allied asserts WFE controlled the site in that, at least once-a-month, a manager from the Charles City plant would visit the site to determine where waste should be disposed of at the site. The same manager is asserted to have addressed problems concerning access to the dumpsite by unauthorized individuals and water run-off with persons from H.E. Construction.

42 U.S.C. § 9607(a)(2) imposes strict liability on "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of." Courts, when determining the liability of a lessee as an "owner-operator," generally look to how much control over and

responsibility for the use of the site the lessor maintains. *Nurad*, 966 F.2d at 842; *Pierson Sand and Gravel, Inc. v. Pierson TWP.*, 851 F.Supp. 850 (W.D.Mich.1994); *U.S. v. South Carolina Recycling and Disposal, Inc.*, 653 F.Supp. 984, 1003 (D.S.C.1984) *rev'd in part on other grounds*. Of particular import in finding lessee liability is the degree of control that the lessee is able to exert "over the activity *on the property* which directly results in the release or threatened release of hazardous substances." *CPC Int'l. Inc. v. Aerojet-General Corp.*, 731 F.Supp. 783, 789 (W.D.Mich. 1989) (emphasis added). Cases finding lessee liability as an owner-operator, concentrate on the fact that the lessee was an operator of the activity directly causing the release of hazardous waste. *U.S. v. Mexico Feed and Seed Co., Inc.*, 980 F.2d 478, 484 (8th Cir.1992) (owner and operator of leaking oil tanks sitting on leased land was owner-operator for CERCLA purposes); *Weyerhaeuser Corp. v. Koppers Co.*, 771 F.Supp. 1406 (D.Md.1991) (operator and lessee of wood treatment plant liable as owner-operator). Where a lessee has no authority to control the activity causing damage, he is not liable as "owner-operators." *See Nurad*, 966 F.2d at 843 (tenants who had no authority to exercise control over the leaking tanks were not liable under CERCLA).

In the case at bar, the lease states that the lessor maintained all control over the property, however, Culbert's affidavit suggests WFE in actuality did exert some control. Whether defendants either directly or derivatively, exerted enough control over the property such that they should be held liable as an owner or operator is the subject of a material factual dispute,

hence, summary judgment on this issue is not appropriate.

Arranger Liabililty

Both Allied and the United States contend the defendants "arranged for" the disposal of hazardous waste at the facility within the meaning of 42 U.S.C. § 9607(a)(3). Plaintiffs assert arranger liability arises where a party had the authority to control the hazardous waste disposal causing the contamination of the facility in question. Defendants assert that the mere authority to control waste disposal is not enough to cause liability to attach. They assert that they cannot be held liable as arrangers unless it is shown that they actually participated in waste disposal decisions. The United States has moved for summary judgment only on the claim that the defendants are derivatively liable as an arranger by piercing the corporate veil. Allied has moved for summary judgment on both derivative and direct liability of the defendants as arrangers.

A party is responsible as an "arranger" if he or she "by contract, agreement, or otherwise arranged for disposal . . . of hazardous substances. . . . " 42 U.S.C. § 9607(a)(3) (1986). "Arranged" is not defined in the statute, however, courts have defined the term liberally in order to achieve CERCLA's remedial purpose. *Florida Power and Light Co. v. Allis Chalmers Corp.*, 893 F.2d 1313 (11th Cir.1990); *Aceto*, 872 F.2d 1373; *United States v. Northeastern Pharmaceutical and Chemical Co.*, 810 F.2d 726, 733 (8th Cir.1986) (hereinafter *"NEPACCO"*). Further, in determining who qualifies as a "responsible person," the

Eighth Circuit has found that the policy underlying CERCLA supports finding liability where "[a]ny other decision, . . . would allow defendants to simply 'close their eyes' to the method of disposal of their hazardous substances. . . . " *Aceto*, 872 F.2d at 1382.

Georgoulis as Corporate Officer

Allied asserts summary judgment against Georgoulis as an arranger is warranted as Georgoulis possessed the ultimate authority to control waste disposal at WFE. Geourgoulis does not dispute that he had the ultimate authority to make decisions at WFE, however he states summary judgment against plaintiffs is required as he had no knowledge of and exerted no actual authority over WFE's waste disposal practices. Defendants assert that some affirmative action in regards to waste disposal by the officer is necessary before a corporate officer can be held directly liable under CERCLA.

The Eighth Circuit has stated that "[i]t is the authority to control the handling and disposal of hazardous substances that is critical under the statutory scheme." *NEPACCO*, 810 F.2d at 743; *Mexico Feed*, 980 F.2d 478. Defendants assert this statement is merely dicta as the Eighth Circuit has only found CERCLA liability where the defendant actually participated in waste disposal decisions. However, other courts which have adopted the "authority to control" test, have clarified that they merely look to the defendant's actual control over hazardous waste procedures as establishing that the defendant had the authority to control disposal and not as a prerequisite to finding liability. *Nurad*, 966 F.2d 837; *City of North*

Miama, Fla. v. Berger, 828 F.Supp 401 (E.D.Va.1993). The defendants contend that the authority to control test has only been used to attach liability to persons as "operators" under § 107(a)(2) of CERCLA and not as "arrangers" and should therefore not be extended to those charged with arranger liability. However, the Eighth Circuit has used this test under a similar environmental statute to determine the liability of a corporate president and shareholder for the damage caused by the waste his corporation disposed of off the corporation's property. *See NEPACCO*, 810 F.2d at 745 (corporate president and shareholder liable as "contributor" under the Resource Conservation and Recovery Act (RCRA)). Therefore, the "authority to control" test appears equally appropriate to determine liabililty as an "arranger" under CERCLA. Further, to hold that liability should be determined differently depending on whether the corporation disposed of waste on its own facility or at a facility off the corporation's property would open a large gap in CERCLA legislation allowing corporate officers to escape liability merely by shipping its hazardous waste offsite. Moreover, the authority to control test is appropriate for arranger liability as to hold otherwise would encourage persons in authority to turn a blind eye to the method of disposal of their corporation's hazardous substances. This would contravene the underlying policy of CERCLA. *See Aceto*, 872 F.2d at 1382.

When addressing the issue of whether an individual had the "authority to control" hazardous waste disposal activities of a corporation, the important factors are whether the individual was a majority stockholder of the corporation, whether the individual held a position on

the corporation's board, or was an officer of the corporation, and whether the individual exercised actual authority over the corporation. *See NEPACCO*, 810 F.2d at 745 (major shareholder and corporate president found liable); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1052-53 (2nd Cir.1985) (president and majority stockholder who exercised ultimate authority over the corporation was found liable as an operator); *U.S. v. Carolina Transformer Co.*, 978 F.2d 832 (4th Cir.1992) (sole stockholder, and president of nineteen years, chairman of the board for four years who acknowledged he was "in charge of the company and 'responsible' for what went on there" was held liable as an operator; a second defendant was held liable as he was a director for eleven years, president for three years, and stated that as the president his responsibilities included everyday operations of the company); *Nurad*, 966 F.2d 837 (two vice-presidents of a company were not found liable where the president was the majority stockholder, and retained all decision-making authority over the company).

Applying these factors to the case at bar, the following facts are undisputed. Geourgoulis was the sole stockholder of TICI and TICU. TICI and TICU, through White Farm Industries, Inc., and White Farm U.S.A. were the sole owners of WFE. Geourgoulis was the president of WFE from December 19, 1980 through November 23, 1981. He was Chairman of the WFE Board of Directors from May 1, 1980 through March 27, 1985. From May 1, 1980 to December 31, 1985, Geourgoulis also held the following positions: Chairman of the Board, White Farm

U.S.A., Inc.; Chairman of the Board, White Farm Industries, Inc.; Chairman of the Board of Directors and President, TIC Services Co.; Chairman of the Board of Directors and President, TICI. Geourgoulis was also President and Chairman of the Board of Directors of TICU from the time of its formation through March of 1985.

The Bylaws of WFE gave Geourgoulis, as president, "general management and control of the business and affairs of the corporation" and made the president the "managing executive officer of the corporation."[1] Therefore, due to Geourgoulis' position as sole stockholder, Chairman of the WFE Board, and president of WFE, he had the authority to assert control over the hazardous waste disposal arrangements of WFE.

The final factor courts consider is the degree of control the defendant actually exerted over the corporation. Defendants contend that plaintiffs must show that Geourgoulis exercised actual control over the daily operations of the corporation, however, courts determining "operator" liability have determined that control over daily operations is not necessary. *See Donahey v. Bogle*, 987 F.2d 1250 (6th Cir.1993) (sole shareholder of a company that deposited its waste materials at a facility which it leased was a responsible party even though the shareholder did not actively participate in the day-to-day activities of the corporation and had no knowledge of the environmental contamination created by it); *Pierson Sand*

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[1] Although Geourgoulis asserts he was in actuality only an "acting" president, nothing within the bylaws or presented by defendants suggest that as acting-president, Geourgoulis had any less authority over WFE.

and Gravel, 851 F.Supp. at 855 (no need to show day-to-day management, as authority to control is sufficient to confer operator status). The necessity for showing that the defendant actually exercised his or her authority is to establish that the defendant was not a mere figurehead, and that he or she played more than a passive role in the corporation. Whether an individual chooses to exercise all the authority he or she has over a corporation is not relevant under the statutory scheme as one purpose of CERCLA is to encourage those individuals with the power to do so, to take action to abate the damage caused by hazardous waste disposal. *See Nurad*, 966 F.2d at 845. To allow those in authority to escape liability because they chose to oversee certain aspects of their corporation, yet ignore hazardous waste disposal practices, would defeat the purpose behind the legislation. *See United States v. Taylor*, 1993 U.S.Dist. LEXIS 19082, at *23.

The undisputed evidence shows that Geourgoulis was not a mere figurehead of WFE or a passive stockholder. The offices of TICI and TICU were headquartered in Dallas, Texas, yet Geourgoulis was often present at WFE's corporate office in Oakbrook, Illinois. Geourgoulis talked daily, sometimes several times a day, with Robert Fuller, vice president and later president of WFE, and James Slife, chief financial officer of WFE about ongoing problems at WFE. Geourgoulis directed David Finatri, WFE Vice President of Personnel and Industrial Relations, to renegotiate WFE's union contracts. Finatri also provided Geourgoulis with continual reports on manpower, summaries of benefit costs for all employees, and sales incentive plans. The submitted manpower reports were broken down by facility and showed the

functions at each facility and the people working within those functions. After review of these reports, Geourgoulis gave specific numbers for manpower reductions at all plants, and even went so far as to personally go through a list of employees at the Charles City plant inquiring whether each employee was necessary to the operations of the plant.[2]

The WFE Board of Directors, of which Geourgoulis was Chairman, made significant decisions affecting WFE and its employees. The defendants give a conclusory assertion that Geourgoulis did not take an active role on the Board, however, as one of only two Board members from December 1980 until March of 1983, Geourgoulis had to have concurred in the actions taken by the Board or the Board would have been deadlocked. During this time period the Board drastically changed the pension benefits of WFE's non-union employees and the insurance benefits of WFE retirees.

Geourgoulis attended and had final authority over WFE management meetings. When Geourgoulis was absent from these meetings, Robert Fuller, the president of WFE, would then confirm certain decisions with Geourgoulis at a later date.[3]

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[2] Geourgoulis stated at deposition that he does not recall taking this action. However, Geourgoulis has never disputed that the event occurred.

[3] Defendants assert that Geourgoulis was a mere advisor at WFE staff meetings, however, this is merely a conclusory statement with no supporting evidence and which is contradicted by the large amount of evidence produced by the plaintiffs in the way of depositions, written documents and

Geourgoulis made the decision to close the Syracuse and Dallas-Fort Worth operations of WFE and to consolidate these operations into other regions. Geourgoulis and Dean Marcy, along with Jim Slife, conducted the negotiations with BWAC for the refinancing of WFE's loans. The then president of WFE, Fuller, was not included or even consulted pursuant to the large scale refinancing of his company.

Geourgoulis oversaw the negotiations between the Charles City Plant Manager and WFE's insurance carrier regarding storm damage to the roof at the Charles City facility. While the face-to-face negotiations were ongoing, the plant manager would stop the negotiations in order to consult with Geourgoulis concerning how to conduct the negotiations and the amount to seek.

Due to Geourgoulis' authority to control WFE and his actual exercise of control over WFE, he is directly liable as an arranger under CERCLA. Finding direct liability, this court will not go on to consider whether Geourgoulis is also derivatively liable as an "arranger" by virtue of the common law theory of piercing the corporate veil.

Liability of TICI and TICU

The Eighth Circuit has not addressed a case in which the parent corporation is being held liable for CERCLA violations. Courts which have addressed this issue have addressed it in respect to finding liability of the parent as

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affidavits that identify specific instances where Geourgoulis clearly took a larger role than that of an advisor.

an operator and not as an arranger. When assessing liability as an operator, courts have found that a parent corporation can be held both directly and derivatively liable under CERCLA. *CPC Intern, Inc. v. Aerojet-General, Inc.*, 777 F.Supp. 549, 572 (W.D.MICH.1991). Direct liability is appropriate where the parent has exerted actual control over the subsidiary inconsistent with its investment relationship. *Id*, at 573. Courts have found the parent directly liable as an operator only where the parent has exerted "actual control" over the activities of the subsidiary.

As was necessary in assessing the liability of a corporate officer for the actions or failure to act of the officer's corporation, something more needs to be shown than merely that the parent corporation had the authority to control the subsidiary. Because it is inherent to any parent-subsidiary relationship that the parent has the authority to control the actions of the subsidiary, *See United States v. Kayser-Roth Corp., Inc.*, 910 F.2d 24, 27 (1st Cir.1990), it would not be appropriate to hold a parent corporation liable for improper waste disposal of the subsidiary's waste where the parent took no active role in the subsidiary and was merely acting within the bounds of its investment relationship.[4]

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[4] One court has asserted that courts have used an "authority to control test" to find parent corporation liability where the parent had the authority to control the activities of the subsidiary, but had not exercised that authority. *Lansford-Coaldale Water Authority v. Tonolli Corp.*, 4 F.3d 1209, 1221 (3rd Cir.1993). In a thorough search of case law, this court was unable to find a court that had utilized such a test for parent corporation liability.

This court finds it appropriate to use case law discussing parent corporation liability as an operator to determine liability as an arranger. Where as here, the question of liability concerns a corporation which is producing the hazardous waste and disposing of it off corporate property, this court finds that it would open a wide hole in CERCLA law should such a corporation be treated differently than a corporation which disposed of its hazardous waste on its own property. The use of the "actual control" test, to also assess arranger liability, ensures that a parent corporation who is active within certain areas of its subsidiary's activities is not encouraged to ignore the hazardous waste practices of the subsidiary.

Again there is a discrepancy among the courts as to how much actual authority must be shown before liability arises. *See Jacksonville Elec. Authority v. Bernuth Corp.*, 996 F.2d 1107, 1110 (11th Cir.1993) (the parent must have exerted actual and pervasive control over the subsidiary to the extent that it actually involved itself in daily operations of the subsidiary); *CPC Intern, Inc. v. Aerojet-General, Inc.*, 777 F.Supp. at 575 (liability arises if the parent exceeded the bounds of an interested investor and entered the realm of an active operator). This court holds the CERCLA policy dictates a finding of liability where the parent has gone beyond an investment relationship with the subsidiary and has exerted actual control over the subsidiary's activities.[5]

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[5] An important reason for so holding is that the parent's exercise of authority in areas seemingly unrelated to waste disposal may directly affect the subsidiary's handling of its waste disposal problems. This is especially true if the parent is

Whether the parent has exerted sufficient control over the subsidiary such that liability should attach is determined on a case-by-case basis according to the particular facts of the case at bar. A review of past court determinations as to whether sufficient control has been exerted is helpful in determining whether TICI and TICU have exerted sufficient control that liability may be assessed.

In *Kayser-Roth*, 910 F.2d 24, the parent corporation was found liable where the parent had total monetary control over the subsidiary, had placed restrictions on the subsidiary's budget, the subsidiary's governmental contacts and real estate transactions had to be funneled through the parent, expenditures greater than $5000 had to be approved by the parent, and almost all of the subsidiary's executive positions were filled by personnel of the parent.

In *Jacksonville Elec. Authority v. Bernuth Corp.*, 996 F.2d 1107, 1110 (11th Cir.1993), no liability was found where the parent's only involvement in the affairs of the subsidiary were the following: the parent had dictated the terms of employment for officers of the subsidiary, the parent was the 100% owner of the subsidiary's stock, the parent had created a profit sharing plan for the subsidiary's executive officers, dividend distributions totaling more than the net earnings were made to the parent, the parent received status reports on the subsidiary's operations,

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making budgetary or cost cutting demands as the subsidiary may then feel compelled to attempt savings in the high cost area of hazardous waste disposal or may feel constrained from seeking an improved waste disposal system.

and the parent hired the executive officers of the subsidiary.

In *CPC Intern, Inc. v. Aerojet-General, Inc.*, 777 F.Supp. at 575, the court found the parent liable where the evidence showed active participation and control by the parent in the subsidiary's affairs both internally through the subsidiary's board and externally through the actions of individual officers within the parent corporation. The court found the parent had full ownership of the subsidiary; active participation and sometimes control over the subsidiary's board which was an active decision-making body; the parent was involved in daily operations through parent officials who served in positions within the subsidiary (president and chief executive officer); there was active policy making and control by parent officials over the subsidiary's environmental matters and labor problems; and the parent exerted financial control over the subsidiary's budget and major capital expenditures.

In *John S. Boyd Co., Inc. v. Boston Gas Co.*, 992 F.2d 401, 407 (1st Cir.1993), the NEES Corp., a holding company, was found liable as an operator of its subsidiary utility companies where NEES had maintained a presence among the officers and directors of the subsidiary; the president of NEES was the president of the subsidiary, the president was appointed by the chairman of NEES and reported directly to NEES officials; NEES selected the directors of the subsidiary; a senior officer of NEES approved the subsidiary's budget and the subsidiary needed the approval of NEES to expend over $5000. The service corporation which provided engineering and administrative services to NEES' holdings was also held

liable as the court found the service corporation provided services such as controlling the checking account, handling the purchase of oil used in peak shaving, and maintaining the subsidiary's property, and employees of the service corporation were also represented among the subsidiary's officers and directors.

Finally, in *Lansford-Coaldale Water Authority v. Tonolli Corp.*, 4 F.3d 1209, 1223-34 (3rd Cir.1993), the appellate court refused to affirm the district court's decision that operator liability could not attach to the parent as the district court had failed to rule on several areas the appeals court felt were important to the determination of control. The appeals court found it significant that the companies shared common officers-president and chief financial officer – with evidence having been presented that officers of both corporations reported to the shared president and that the president exerted final decision making authority over all facets of the two companies operations and management; and that it was not determined whether a shared employee was actually involved in hazardous waste decisions of the subsidiary.

In the case at bar, there is a great deal of evidence to show active parent corporation involvement in the affairs of WFE. All of Geourgoulis' involvement in WFE outlined above is applicable to determining parent corporation involvement as Geourgoulis was president and chairman of the board of directors for both TICI and TICU. The defendants themselves have acknowledged that TICI and TICU were involved in lowering labor and personnel

costs at WFE.[6] Further, the evidence submitted shows that Geourgoulis maintained final authority over the areas of manpower and staffing at WFE.[7]

TICI and TICU, through various holding companies, owned 100% of WFE stock. From the acquisition of WFE until May 1983, parent corporation officials, Geourgoulis and Dean Marcy were the only individuals on WFE's Board of Directors. The Board was an active decision-making body, participating in WFE's labor matters, staffing, non-union employee benefit levels, pension plans and retiree insurance plans. Parent corporation officials, Geourgoulis and Marcy, negotiated the loan agreement with BWAC to refinance WFE and the $15 million loan was guaranteed by another TIC holding company, White Farms U.S.A.

There was also an overlap in several of the offices of WFE and various TIC holding companies. Marc Silverstein served as Secretary and General Counsel for each corporation listed from 1982 through 1984, Dean Marcy

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[6] Defendants assert that TICI and TICU participated in these areas of WFE because of requirements the Bankruptcy Court made when TICI purchased WFE while in bankruptcy. However, CERCLA is a strict liability act allowing only statutorily constructed defenses.

[7] Defendants dispute Robert Fuller's statement that the TIC corporations had final authority over manpower and staffing decisions by showing that Fuller personally focused on cost-cutting measures at WFE including the areas of staffing and manpower. However, this does not contradict Fuller's statement that TICI and TICU maintained the final say over these matters and that TICI and TICU officials took their own initiative in these areas.

acted as Senior Vice President for each company during this same time period and Geourgoulis was president of WFE from December 1980 through November 1981.

Geourgoulis created the Office of Administrative Affairs within TICI and placed it under the direction of TIC Services employee, Emerson Barrett, Vice-president of Administration. Barrett was responsible for the oversight of the following functional areas within each TICI subsidiary: Personnel Administration, Industrial Relations, Industrial Safety, Employee Benefits, Office Services, Non-financial Government relations, and External Public Relations. All employees at WFE which had assigned responsibilities in any of these areas were subordinate to Barrett. All changes in job status or compensation of these employees required Barrett's approval. The Office of Administrative Affairs was also given the authority to promulgate reporting requirements and to "issue such policy as may be needed to assure orderly and economic business conduct in the functional areas specified."

Financial arrangements between the TIC corporations and WFE were not handled at arms length. The president of WFE was not involved or consulted as to the refinancing of WFE. The refinancing was handled by Geourgoulis, Marcy and Slife and involved a guarantee by White Farms U.S.A. Further, the corporate fee TIC Services charged WFE for corporate services bore no relation to the formula which the defendants themselves assert is normally used to determine how much each subsidiary is required to pay for the services it receives from its parent. The undisputed fact that TIC Services had arranged to charge WFE an extra 40% for corporate services as profit

to TIC Services until BWAC insisted that limitations on the corporate charge be imposed further shows that this charge had no relation to the actual market value of the services provided. TICI and TICU also filed consolidated tax returns for the period December 1981 through December 1985 which included WFE's finances.

Due to the level of active involvement of TICI and TICU in the affairs of WFE, this court finds that each is directly liable as an arranger concerning the disposal of WFE's hazardous waste at the dumpsite owned by H.E. Construction.[8]

Accordingly, **It Is Ordered:**

1. Allied Product Corporation's Motion for Summary Judgment as to each defendant's direct liability under § 107(a)(2) of CERCLA is denied, it is granted as to each defendant's direct liability under § 107(a)(3) of CERCLA, and the court declines to consider the defendants derivative liability under § 107(a)(3) of CERCLA.

2. The court declines to consider the United States' Motion for Summary Judgment as to each defendants'

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[8] This court would also find liability of all defendants under the alternative theory of "arranger" liability which finds a person liable if there is a sufficient nexus between the defendant and the complained of hazardous substance. *General Electric Co. v. AAMCO Transmissions, Inc.*, 962 F.2d 281, 286 (2nd Cir.1992). Liability is found under this theory not only where the defendant was actively involved in decisions regarding hazardous waste disposal, but also where the defendant was obligated to control the hazardous substances. *United States v. Fleet Factors Corp.*, 821 F.Supp. 707, 724 (S.D.Ga.1993). This court believes that the defendants' extensive involvement in WFE obligated them to oversee WFE's waste disposal practices.

derivative liability under § 107(a)(3) of CERCLA on the theory of piercing the corporate veil. The United States is free to submit a summary judgment motion regarding defendants' direct liability under § 107(a)(3) of CERCLA as the United States did plead this theory of liability in its complaint.

3. The defendants' Motion for Summary Judgment is denied as to defendants' liability under § 107(a)(2) of CERCLA and as to direct liability under § 107(a)(3) of CERCLA.

Done and so ordered.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-1035NIW

United States of America, et al.,	*	
	*	Order Denying Petition for
	*	Rehearing and Suggestion
Appellees,	*	for Rehearing En Banc
	*	
vs.	*	
	*	
TIC Investment Corporation, et al.,	*	
	*	
Appellants.	*	

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

January 3, 1996

Order Entered at the Direction of the Court:
/s/
Clerk, U.S. Court of Appeals, Eighth Circuit

95-1698

Supreme Court, U.S.
FILED
MAY 6 1996
CLERK

No._____

In The
Supreme Court of the United States
October Term, 1995

STRATTON GEORGOULIS,
Petitioner,

v.

UNITED STATES OF AMERICA and
ALLIED PRODUCTS CORPORATION,
Respondents.

Brief in Opposition to Petition For Writ of Certiorari to
The United States Court of Appeals for the Eighth Circuit

ALLIED PRODUCTS CORPORATION'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether an officer and ultimate owner of a corporation can be liable as a person who arranged for the disposal of hazardous substances under CERCLA § 107(a)(3) when he exercised pervasive and usurping control over the corporation, had the authority to control the corporation's generation and disposal of hazardous substances, and exercised actual and substantial control, directly or indirectly, over the corporation's generation and arrangement for disposal of hazardous substances.

PARTIES

PETITIONER: Stratton Georgoulis

RESPONDENTS: United States of America Allied Products Corporation

Allied Products Corporation has no parent corporations or non-wholly owned subsidiaries. Sup. Ct. R. 29.6.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Allied Products Corporation ("Allied") files this Brief in Opposition to the Petition for a Writ of Certiorari and would respectfully show as follows:

STATEMENT OF THE CASE

During the period 1980 to 1985, White Farm Equipment Company ("WFE") arranged to have H.E. Construction Company haul and transport waste foundry sand and ash from WFE's farm implement manufacturing facility in Charles City, Iowa to a privately-owned dumpsite (the "Dumpsite"). The waste foundry sand and ash contained lead, cadmium, and chromium, which are hazardous substances under CERCLA. There has been a release of hazardous substances from the Dumpsite and the remedial actions required to clean up the Dumpsite have resulted in Allied incurring substantial response costs.

From November 1980 to December 31, 1981, Petitioner Stratton Georgoulis ("Georgoulis") owned WFE in the following manner: Georgoulis owned all of the stock of TIC Investment Corporation ("TICI"), which owned all of the stock of White Farm Industries ("WFI"), which owned all of the stock of White Farm U.S.A. ("WFUSA")[1], which owned all of the stock of WFE. From December 31, 1981 to May 1985, Georgoulis owned WFE in the following manner: Georgoulis owned all of

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[1] TICI incorporated WFI and WFUSA in November 1980 with $1000 in capital each. WFUSA purchased WFE in exchange for a $1 million promissory note and an assumption of WFE's prior liabilities. The $1 million promissory note was never paid.

the stock of TIC United Corporation ("TICU") (TICI and TICU are collectively referred to as the "TIC Companies"), which owned all of the stock of WFI, which owned all of the stock of WFUSA, which owned all of the stock of WFE.

Georgoulis was Chairman of the Board for TICI, TICU, WFI, WFUSA, and WFE from 1980 to 1985, and he was President of WFE from December 19, 1980 to November 23, 1981. On two separate occasions, Georgoulis hired another person as WFE president; each served nominally for about one year before being fired by Georgoulis. As Chairman of the Board for WFE, Georgoulis was the "ranking and chief executive officer of the corporation." Georgoulis had "all of the powers granted by the bylaws to the president, including the power to make and sign contracts and agreements in the name and on behalf of the corporation. . . . He shall also, in general, have supervisory powers over . . . the business activities of the corporation, subject to the approval of the board of directors." Bylaws of WFE.

The Board of Directors for each of the above entities from December 1980 to May 1983 consisted of two individuals: Georgoulis and an employee of the TIC Companies. As only one of two board members, no board action could take place without Georgoulis' approval. The Board of Directors for WFE was expanded from two to five directors on May 20, 1983 after a major creditor required board expansion as a condition of refinancing.

Consistent with his power to control all aspects of WFE, Georgoulis exercised that power to indirectly yet inescapably control WFE's arrangements for disposal of its hazardous foundry sand and ash. Georgoulis made decisions and took actions which had the inevitable effects of (1) preventing any person at WFE from changing WFE's absurdly inexpensive arrangement for disposal of hazardous foundry sand and ash at

the Dumpsite[2] and (2) determining the amount of hazardous waste generated by WFE.

Georgoulis set the excessively restrictive financial policy at WFE which made a more expensive, environmentally-acceptable means of disposal for the foundry sand and ash impossible. He and TIC employee, Emerson "Buck" Barrett ("Barrett"):

> looked at every possible thing that we could find . . . that might save a buck because the patient [i.e. WFE] was bleeding. . . . We — the search was constantly for dollars in anywhere they could be found and appropriately so. . . . He, [i.e. Georgoulis] needed to — wanted to know everything about everything and, again, appropriately. The — I spent my time on — first and foremost on whatever it was that Strat [Georgoulis] — was on Strat's agenda on a particular day or hour and my — any efforts that I made on my own were under the direct and implied concerns of Strat to reduce his expenditures at White Farm.

Deposition of Emerson Barrett.

According to WFE employees, Georgoulis completely dominated all of the decision making at WFE and did not delegate this responsibility to others. WFE employees were under strict orders from Georgoulis not to increase WFE's costs and to do everything possible to reduce costs at the company across the board. Whenever WFE employees did not do exactly what Georgoulis expected, Georgoulis terminated them.

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[2] The bills from H.E. Construction for hauling and disposing of the foundry sand and ash reflect costs to be expected for nonhazardous rather than hazardous waste handling.

Prior to TIC's purchase of WFE, WFE leased the Dumpsite from H.E. Construction Company "for the specific purpose of Lessee using said real estate for a dumping ground for disposing of its casting facility's solid waste material." When TIC management directed that any standing lease, maintenance contract, or service contract had to be justified or it would be terminated, this Lease of the Dumpsite was reviewed to determine whether or not to continue it. The renewal of this Lease was within the area of responsibility of Robert Fuller ("Fuller"). Fuller held the titles of Chief Operating Officer and Executive Vice-President of WFE (January 1981 to April 1982) and President of WFE (October 1982 to October 1983), but he had virtually no decision-making authority independent of Georgoulis. Fuller testified that he would have brought the renewal of the Lease to Georgoulis' attention because Georgoulis wanted to be informed on any action requiring the expenditure of a significant amount of money. Because there was no other means of disposing of the waste which met Georgoulis' strict financial constraints, the Lease was continued during the period of Georgoulis' ownership by means of a notation on a purchase order to H. E. Construction.

Georgoulis maintained constant control over all aspects of WFE's operations and management. Georgoulis stayed in constant, and often daily, contact with WFE officers and employees through telephone calls. Georgoulis would sometimes call a single WFE officer or employee ten times in one day. According to one TIC employee, "Strat [Georgoulis] lived on the telephone . . .." In addition, Georgoulis maintained an office at WFE's headquarters in Oak Brook, Illinois, and at a minimum, chaired bi-weekly and monthly staff meetings in the WFE corporate offices.

Hazardous waste foundry sand and ash were generated during the casting of tractor bodies and parts in the foundry at the WFE Charles City facility. Georgoulis personally set the production levels of those tractors at the Charles City facility,

thus determining the amount of hazardous foundry sand and ash generated. Georgoulis also set the marketing and financing plans available to WFE tractor dealers, thereby further setting the production volume of WFE tractors. Similarly, Georgoulis determined the number of production personnel and other staff available at each plant. During the period of his ownership and control, Georgoulis personally reviewed the status of each employee of WFE's Charles City plant and foundry to determine whether to retain or fire that individual.

Georgoulis had other significant personal involvement in the management of WFE. Georgoulis requested and received weekly manpower and employee benefit reports on all WFE personnel. Georgoulis ordered the reduction of the salaried non-union pension plans at WFE in 1981. He ordered the discontinuance of the salaried retiree insurance program and its change into a contributory plan. Georgoulis ordered and directed renegotiations with the United Auto Workers in 1981 in an effort to secure additional concessions in wages and benefits. He personally negotiated on behalf of WFE with the Pension Benefit Guarantee Corporation following his decision to terminate the hourly pension plans.

In May of 1983, Georgoulis negotiated on behalf of WFE with its major creditor concerning terms for the refinancing of a loan and failed to involve or even inform Fuller, the then-current President of WFE, of the refinancing. According to a number of WFE officers and employees, no one at WFE made significant decisions besides Georgoulis, who owned and operated WFE as he saw fit.

According to Barrett, "White Farm was out of business. TIC was the — the corporation that was operating the business. There was no White Farm except in name," and "there was no management except that of TIC," for which Georgoulis was the Chairman of the Board, CEO, President, and sole shareholder.

REASONS FOR DENYING THE WRIT

Under the unusual and undisputed facts presented above, the United States District Court for the Northern District of Iowa ("District Court") and the United States Court of Appeals for the Eighth Circuit ("Eighth Circuit") found Georgoulis liable under CERCLA § 107(a)(3) as a person who "by contract, agreement, or otherwise arranged for disposal" of hazardous substances. These courts found that the individual who owned WFE, who had the authority to control and did pervasively control the operations and management of WFE, who tightly exercised that control in a manner that usurped the power of WFE's officers and supervisors, who set excessively restrictive financial policies that did not allow for an environmentally sound method of disposal of hazardous wastes, and who thereby indirectly yet inescapably arranged for the disposal of WFE's hazardous substances was liable as an arranger under CERCLA § 107(a)(3). In so finding, these courts followed established precedent which is consistent among the circuits.

This is not a decision which is worthy of review by the Supreme Court. This is an intensively fact-bound decision which, due to the unusual nature of the facts, does not have broad applicability. There is no conflict between this decision by an unanimous Eighth Circuit panel and the decisions of any other circuits. *See* Sup. Ct. R. 10(a). The Eighth Circuit's standard for liability of a person who arranged for the disposal of hazardous substances under CERCLA § 107(a)(3), as expressed in its decision in this case, is entirely consistent with other circuits' standard of arranger liability under CERCLA. Petitioner has mischaracterized the standard of arranger liability in this decision to attempt to create a conflict among the circuits where none exists. Finding Georgoulis liable in this case is also entirely consistent with the language and purposes of CERCLA and with established Eighth Circuit precedent. Respondent Allied

respectfully requests the Court to deny Georgoulis' petition for a writ of certiorari.

A. Arranger Liability Under CERCLA

The Eighth Circuit's standard for arranger liability under CERCLA is consistent with the standard of other circuits that have addressed it and is substantially different from the Petitioner's characterization of it. The standard as stated by the Eighth Circuit is as follows:

> the proper standard to be applied in this case imposes direct arranger liability on a corporate officer or director if he or she had the authority to control and *did in fact exercise actual or substantial control, directly or indirectly, over the arrangement for disposal, or the off-site disposal, of hazardous substances.*

United States v. TIC Inv. Corp., 68 F.3d 1082, 1089 (8th Cir. 1995) (emphasis added).

The Petitioner has asserted that Georgoulis was held liable as an arranger merely because, as Chairman and sometime President of WFE, he had the authority to control WFE's disposal of hazardous substances. Unlike the Petitioner's characterization, the court below did not let Georgoulis' liability rest merely on his "authority to control" WFE's arrangement to dispose of hazardous substances. Instead, the Eighth Circuit held:

> [A] finding of arranger liability requires some level of *actual participation* in, or *exercise of control* over, activities that are *causally connected* to, or have some *nexus* with, the arrangement for disposal of hazardous

substances or the off-site disposal itself.

TIC Inv., 68 F.3d at 1987-88, 90 (citing *General Elec. Co. v. AAMCO Transmissions, Inc.*, 962 F.2d 281, 286-87 (2d Cir. 1992)) (emphasis added).

Petitioner argues that the mere "authority to control" standard, which he asserts was adopted by the court below, makes every chief executive officer of every corporation who delegates authority and relies on the judgments of others "potentially liable as a person who arranged for the disposal of that corporation's waste." See Petition for Writ of Certiorari at 7. This argument disappears under a true reading of the Eighth Circuit's decision. The Eighth Circuit specifically found that Georgoulis would *not* have been liable as an arranger if he, like most corporate CEO's, had "truly delegated authority to others and allowed those individuals to exercise their judgment with respect to WFE's waste disposal practices without his interference." *TIC Inv.*, 68 F.3d at 1090. In contrast, under the unique facts of this case, Georgoulis *was* held liable because he "so usurped the power of those who were only nominally running WFE," and "so tightly controlled WFE['s] . . . budgetary aspects, that he left WFE employees with no other choice but to continue with the relatively inexpensive arrangement that had historically existed between WFE and [H.E. Construction]." *Id.* Georgoulis exercised substantial control over WFE's waste disposal arrangement because "Georgoulis' actions inexorably led to the continuation of the disposal of WFE's wastes at the dumpsite." *Id.* The Eighth Circuit therefore has not opened any floodgates of CERCLA liability for corporate CEO's by this fact-based decision.[3]

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[3] Generally, the Supreme Court will not grant certiorari when review is sought of a lower court decision which turns solely upon an analysis of the particular facts involved. Stern, Gressman, Shapiro, and Geller, Supreme Court Practice (7th ed. 1993) at 4.14 p.189.

B. This Decision Is Not in Conflict with Decisions of Other Courts of Appeals

The decision of the court below is consistent with the decisions of other circuit courts which define the boundaries of arranger liability under CERCLA § 107(a)(3). Petitioner argues that the decision below conflicts with *General Elec. Co. v. AAMCO Transmissions, Inc.*, 962 F.2d 281 (2d Cir. 1992); *Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746 (7th Cir. 1993), cert. denied, 114 S. Ct. 691 (1994); *United States v. USX Corp.*, 68 F.3d 811 (3d Cir. 1995); and *Florida Power & Light Co. v. Allis Chalmers Corp.*, 893 F.2d 1313 (11th Cir. 1990). No circuit has stated that any of its decisions conflict with the decision below, nor has the Eighth Circuit stated that its decision conflicts with the decisions of any other circuit. As shown below, no such conflict exists.[4]

General Electric is in complete agreement with the Eighth Circuit's decision in this case. The Second Circuit stated the following standard for arranger liability under CERCLA:

> Although arranger liability can attach 'to parties that do not have active involvement regarding the timing, manner or location of disposal,' there must be some nexus between the potentially responsible party and the disposal of the hazardous substance. This nexus is premised upon the potentially liable party's conduct with respect to the disposal or transport of hazardous wastes.

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[4] Petitioner also argues that the Eighth Circuit's decision conflicts with district court decisions both within and outside the Eighth Circuit. However, absent some unusual circumstances not present here, the Supreme Court does not grant certiorari to review a decision of a federal court of appeals because it is in conflict with a decision rendered by a district court. Supreme Court Practice at 4.8 p. 178-79

General Elec., 962 F.2d at 286 (citations omitted). The Eighth Circuit actually took its "nexus" requirement for arranger liability from the *General Electric* decision. *TIC Inv.*, 68 F.3d at 1087 & n.4. The General Electric court adopted a standard for arranger liability that is very similar to the Eighth Circuit's standard: "it is the *obligation* to exercise control over hazardous waste disposal . . . that makes an entity an arranger under CERCLA's liability provision." *General Elec.*, 962 F.2d at 286 (emphasis added). The Second Circuit held that oil companies that leased service stations to dealers were not liable as arrangers because they had "no obligation to arrange for the disposal of waste oil collected by their dealers." *Id.* at 287. *General Electric* is in complete agreement with the Eighth Circuit's decision.

The Seventh Circuit's decision in *Amcast* is consistent with the decision below. The fact that *Amcast* states that the words "arranged for" "imply intentional action" does not conflict with the Eighth Circuit's decision. 2 F.3d at 751. In *Amcast*, a distributor of trichloroethylene hired a common carrier to haul virgin trichloroethylene to a customer. *Id.* at 747-48. The Seventh Circuit found that the distributor was not liable as an arranger under CERCLA after the hired common carrier spilled trichloroethylene on the ground while transferring the material into the customer's holding tank.

The Seventh Circuit held that arranger liability did not exist because no one was "trying to arrange for the disposal of hazardous wastes . . .." *Id.* at 751. The distributor was merely attempting to deliver a valuable product to a customer and there was no finding that spilling hazardous wastes was inherent in the transportation of the virgin trichloroethylene. Therefore, there was no "arrangement" for disposal of hazardous substances. *See TIC Inv.*, 68 F.3d at 1087 n.3 (Eighth Circuit held that the Amcast decision was not in conflict with its own decision and that there was *"no arrangement"* in the *Amcast* case). In contrast, there is no dispute that WFE arranged with

H.E. Construction to dispose of hazardous foundry sand and ash at the Dumpsite and that Georgoulis continued this arrangement at WFE by his excessive control and overly restrictive financial policies. In this case, there were intentional acts by WFE to arrange for the disposal of hazardous substances and intentional acts by Georgoulis to exercise excessive control and maintain overly restrictive financial policies. Therefore, *Amcast* is not in conflict with the decision below.

The Third Circuit's *USX Corp.* decision is not in conflict with the Eighth Circuit's decision below. *See* 68 F.3d 811. In *USX Corp.*, the United States filed a motion for summary judgment against individual officers of a waste hauling company. The United States' claims against the officers related to the company's disposal of drums of hazardous wastes on an employee's wooded parcel of land. *Id.* at 816. The Third Circuit held that one of the critical elements of transporter liability under CERCLA § 107(a)(4) is that the transporter "either selected the disposal facility or has substantial input into deciding where the hazardous substance should be disposed." *Id.* at 820. As the Court explained, this active participation standard for site selection is unique to transporter liability because "transporters often play an influential role in the decision to dispose waste at a given facility." *Id.* at 821. There is no such requirement for site selection for arranger liability under CERCLA § 107(a)(3). *Acme Printing Ink Co. v. Menard, Inc.*, 881 F. Supp. 1237, 1249 (D. Wis. 1995); *United States v. Mottolo*, 695 F. Supp. 615, 626 (D.N.H.1988); *United States v. Conservation Chem. Co.*, 619 F. Supp. 162, 233-34 (W.D. Mo.1985); *United States v. Ward*, 618 F. Supp. 884, 895 (E.D.N.C.1985).

In *USX Corp.* there was no evidence that any of the individual defendants chose, participated in choosing, or took any actions that had the inevitable result of choosing the disposal site. *Id.* at 825. There was, however, evidence that the individual defendants had little involvement in the operational aspects of

the day-to-day business. *Id.* at 825-26. This differs significantly from Georgoulis' actions at WFE in which he usurped power from officers and employees of WFE and, through such personal control and excessive financial restrictions, left WFE employees with no other choice but to continue the arrangement for disposal of hazardous foundry sand and ash at the Dumpsite. Because "transporter" liability under CERCLA § 107(a)(4) differs so significantly from "arranger" liability and because the facts of the two cases differed in such important ways, *USX Corp.* is not in conflict with the decision of the court below.

The decision below is entirely consistent with the Eleventh Circuit's *Florida Power* decision. In *Florida Power*, the Eleventh Circuit construed CERCLA liberally due to its "broad remedial nature." 893 F.2d at 1318. That court held that a party may be liable even though it "does not make the critical decisions as to how, when, and by whom a hazardous substance is to be disposed . . .." *Id.* The *Florida Power* court, like the Eighth Circuit here, only required that a person "is the party responsible for 'otherwise arranging' for the disposal of the hazardous substance" in order to be liable as an arranger under CERCLA § 107(a)(3). Id. In that case, the court reached the unremarkable conclusion that manufacturers of electrical transformers containing PCB's who sold the transformers to Florida Power & Light forty years prior to their discontinuation and disposal had not "otherwise arranged" for the disposal of the PCB's. *Id.* at 1318-19. The *Florida Power* decision of the Eleventh Circuit is not in conflict with the decision below.

Because Petitioner has not shown any conflict between the decision of the Eighth Circuit and the decisions of any other circuits, Petitioner has no basis for a writ of certiorari under Sup. Ct. R. 10(a).

C. The Eighth Circuit's Rejection of a "Specific Intent" Requirement For Arranger Liability Agrees With Its Own Precedent, Precedent of Other Circuits, And The Language And Goals of CERCLA

The gist of Petitioner's remaining argument is that the Eighth Circuit erred in ignoring its own precedent by rejecting the "specific intent" requirement for arranger liability under CERCLA, ignoring precedent from other circuits, and ignoring the language and policies of CERCLA. As shown below, each of these contentions is in error.

1. Eighth Circuit Precedent and the *Aceto* Decision

The Eighth Circuit has already determined that the decision below is consistent with its prior decisions regarding liability under CERCLA.[5] When the Eighth Circuit finds that the decision of a panel "directly conflicts with Supreme Court or Eighth Circuit precedent," it may order a hearing en banc. 8th Cir. R. 35A(a). Petitioner has already moved for rehearing en banc on the basis that the decision below was in conflict with Eighth Circuit precedent. The Eighth Circuit denied Petitioner's Suggestion for Rehearing En Banc on January 3, 1996. Appendix to Petition for Writ of Certiorari at 53.

Petitioner argues that the decision below is in conflict with *United States v. Vertac Chemical Corp.*, 46 F.3d 803 (8th Cir.), *cert. denied*, 115 S. Ct. 2609 (1995). In *Vertac*, the key issue was whether the "United States 'owned or possessed' hazardous substances within the meaning of § 9607(a)(3)," in order to be liable as an arranger under CERCLA for the disposal of hazardous wastes associated with the production of Agent

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[5] Ordinarily, a conflict between decisions rendered by different panels of the same court of appeals is not a sufficient basis for granting a writ of certiorari. Supreme Court Practice at 4.6 p. 176-77

Orange. 46 F.3d at 810. The Eighth Circuit determined that the United States did not "own or possess" the disposed hazardous substances. *Id.* at 810-11. In contrast, in the decision below, "there is no dispute that the hazardous substances disposed of at the dumpsite were owned by defendants [including Georgoulis]." *TIC Inv.*, 68 F.3d at 1086. Also, the decision below echos *Vertac* in requiring more than mere "authority to control" for liability. *Id.* at 1087. Therefore, there is no conflict either in the standard for arranger liability or in the application of the standard to the respective defendants.[6]

In the decision below, the Eighth Circuit held that it had already "implicitly rejected a specific intent requirement" for arranger liability under CERCLA in *United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373 (8th Cir. 1989) (Aceto). *TIC Inv.*, 68 F.3d at 1088. Petitioner argues that the Eighth Circuit has incorrectly interpreted its own decision in *Aceto* and has misinterpreted Eighth Circuit precedent applicable to arranger liability under CERCLA. Petition for Writ of Certiorari at 14-15 & n.4. However, the *Aceto* decision is clear in rejecting a specific intent requirement.

In *Aceto*, pesticide manufacturers sent pesticides to a formulator for blending and packaging and the formulator improperly disposed of the hazardous wastes that resulted from the blending and packaging operation. *Aceto*, 872 F.2d at 1375. The United States and the State of Iowa sued the pesticide manufacturers as arrangers under CERCLA § 107(a)(3). *Id.* The manufacturers argued that the complaint against them should be dismissed because "the plain meaning of the statute requires

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[6] Nor is the decision below inconsistent with *United States v. Gurley*, 43 F.3d 1188 (8th Cir. 1994), *cert. denied*, 116 S. Ct. 73 (1995), in which the Eighth Circuit discussed but did not attempt to delineate the standard for arranger liability under CERCLA § 107(a)(3). The *Gurley* case applied only an operator liability standard under CERCLA §107(a)(2).

an intent to dispose of some waste" in order to impose arranger liability under CERCLA § 107(a)(3). *Id.* at 1379 (emphasis added). In fact, the defendants argued that dictionary definitions of the word "arrange" requires an element of intent. *Id.* at 1380. The Eighth Circuit expressly rejected the manufacturers' intent arguments and held that the complaint stated a cause of action under CERCLA § 107(a)(3) because (1) the generation of hazardous wastes was inherent in the pesticide formulation process, (2) the formulator could not formulate the manufacturers' pesticides without wasting and disposing of some portion of them, and (3) manufacturers could not have hired the formulator to formulate their pesticides without also "arranging for" the disposal of the waste.[7] *Id.* at 1379, 1382. Therefore, it is clear that "intent to dispose" is not an element of arranger liability under CERCLA § 107(a)(3).

2. Other Circuits Have Also Followed The *Aceto* Decision

Numerous courts of appeal have cited the Eighth Circuit's *Aceto* decision with favor. In *General Electric*, the Second Circuit cited *Aceto* with approval as an example of a court finding a nexus between the potentially liable party and the disposal of hazardous substances. 962 F.2d at 286-87. In *Jones-Hamilton Co. v. Beazer Materials & Services, Inc.*, because the facts of the case were so similar to those in *Aceto*, the Ninth Circuit denied summary judgment to a chemical manufacturer defendant who had contracted with a chemical formulator that had disposed of hazardous substances. 973 F.2d 688, 695 (9th Cir. 1992). In *Florida Power*, the Eleventh Circuit cited Aceto as support for its rejection of the requirement that in order for persons to be liable as arrangers for disposal of hazardous substances under CERCLA § 107(a)(3) they must

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[7] There was no allegation in *Aceto* that the manufacturers knew or should have known that the generation of hazardous wastes was inherent to the presticide formulation process.

have "made the crucial decision how it would be disposed of or treated, and by whom." 893 F.2d at 1318 (citing with disapproval *United States v. A & F Materials Co.*, 582 F. Supp. 842 (S.D. Ill. 1984), on which Petitioner relies in Petition for Writ of Certiorari at 16). As seen here, the Eighth Circuit's rejection of the specific intent requirement for arranger liability in *Aceto* has met with approval by the other circuits that have addressed the issue.

3. Requiring "Specific Intent" Would Not Meet the Language and Purposes of CERCLA

The Eighth Circuit's interpretation of CERCLA § 107(a)(3) to include as arrangers persons who "had the authority to control and did in fact exercise actual or substantial control, directly or indirectly, over the arrangement for disposal of hazardous substances" is consistent with the language and purposes of CERCLA. "Congress used broad language in providing for liability for persons who 'by contract, agreement, *or otherwise arranged for*' the disposal of hazardous substances" in CERCLA § 107(a)(3). *Aceto*, 872 F.2d at 1380 (emphasis in original). "Congress has not, however, provided a definition for the phrase 'otherwise arranged'" in CERCLA. *General Elec.*, 962 F.2d at 285. A liberal judicial construction of this phrase as used in the decision below is consistent with CERCLA's "overwhelmingly remedial" statutory scheme. *Florida Power*, 893 F.2d at 1317.

As the Eighth Circuit explained, finding Georgoulis liable is consistent with Congress' goals in enacting CERCLA:

> (1) to ensure that those responsible for the problems caused by hazardous wastes are required to pay for the clean-up costs . . . and (2) to ensure that responsible persons are not allowed to avoid liability by remaining idle.

TIC Inv., 68 F.3d at 1088. Because "CERCLA places the ultimate responsibility for clean up on those *responsible* for problems caused by the disposal of chemical poisons," *Aceto*, 872 F.2d at 1377 (emphasis added), a corporate officer who owns and intrusively runs a corporation and "dictate[s] hazardous waste decisions through day-to-day strict control of budgets, production, and capital investments," who strips the employees of their independent decision-making, but who "knows well enough to close his or her eyes to the specific details of the company's hazardous waste disposal practices" should be liable under CERCLA for that corporation's arrangements for disposal of hazardous substances. *See TIC Inv.*, 68 F.3d at 1089. This meets the "overwhelmingly remedial" statutory scheme of CERCLA, *see Florida Power*, 893 F.2d at 1317, by not allowing those ultimately responsible for the disposal of hazardous substances to escape liability.

CONCLUSION AND PRAYER FOR RELIEF

The decision of the Eighth Circuit that held Georgoulis liable as an arranger under CERCLA § 107(a)(3) follows the plain language and the purposes of the statute, which place liability on one who "otherwise arranged" for disposal of hazardous substances. This fact-based decision, which reiterates previously-established standards of arranger liability of a corporate owner and officer under CERCLA § 107(a)(3), is not in conflict with the decisions of other courts of appeal or with Eighth Circuit precedent. Respondent Allied respectfully requests that the petition for writ of certiorari be denied.

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No. 95-1698

In the Supreme Court of the United States

OCTOBER TERM, 1995

STRATTON GEORGOULIS, PETITIONER

v.

UNITED STATES OF AMERICA AND
ALLIED PRODUCTS CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner is liable under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9607(a)(3), as a person who arranged for a company's disposal of hazardous wastes, where he was the sole shareholder of the company's corporate parents, he acted as chief executive officer of the company, he exercised detailed and virtually absolute control over the company's operations, and he precluded his subordinates from exercising independent authority.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A26) is reported at 68 F.3d 1082. The opinion of the district court (Pet. App. A27-A52) is reported at 866 F. Supp. 1173.

JURISDICTION

The court of appeals entered its decision on October 16, 1995, and it denied a petition for rehearing on January 3, 1996. Pet. App. A53. The petition for a writ of certiorari was filed on April 2, 1996. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

The United States and Allied Products Corporation (Allied) sued petitioner and two corporate entities under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601, *et seq.*, for recovery of response costs incurred in cleaning up hazardous substances dumped at the White Farm Equipment Dump Site in Charles City, Iowa. The district court entered partial summary judgment, holding that petitioner and the corporate entities are liable as "person[s] who * * * arranged for disposal" of hazardous substances under Section 107(a)(3) of CERCLA, 42 U.S.C. 9607(a)(3). The district court certified the question for interlocutory appeal, 28 U.S.C. 1292(b), and the court of appeals affirmed the entry of summary judgment against petitioner. It reversed the entry of summary judgment against the corporate entities and remanded the case for further factual development with respect to their liability.

1. CERCLA creates a comprehensive federal program for cleaning up inactive hazardous waste disposal sites. See *Key Tronic Corp.* v. *United States*, 114 S. Ct. 1960, 1964 (1994). Section 104 of CERCLA authorizes the President of the United States to respond directly to releases or threatened releases by undertaking "removal" and "remedial" actions in conformity with the National Contingency Plan (NCP). 42 U.S.C. 9604. Section 105 directs that the NCP shall include a National Priorities List (NPL) identifying the sites that pose the most serious need for cleanup. 42 U.S.C. 9605; see 40 C.F.R. Pt. 300 (setting out the NCP and NPL). Section 106 of CERCLA grants the President authority to issue

orders to compel liable persons to respond to releases or threats of release, 42 U.S.C. 9606, while Section 107 allows the United States to recover its response costs from liable parties, 42 U.S.C. 9607.

2. White Farm Equipment Company (WFE) owned and operated a farm equipment manufacturing plant in Charles City, Iowa. From the early 1970s to 1985, WFE dumped foundry wastes containing hazardous substances at a disposal site owned by H.E. Construction Company (HEC). In 1988, the EPA listed that facility, commonly known as the White Farm Equipment Dump Site, on the NPL. See 40 C.F.R. Part 300, App. B. (1993). The United States, acting pursuant to its authority under CERCLA, and Allied, which purchased WFE in 1985, have spent considerable sums in responding to the release and threats of release of hazardous substances at the site. They brought separate actions under Section 107 of CERCLA to recover appropriate portions of those response costs from petitioner and related corporate entities, who had previously controlled WFE's operations. Pet. App. A1-A3, A27-A28.

3. The United States and Allied moved for partial summary judgment against petitioner and two related corporate entities, arguing, among other things, that those parties were liable under Section 107 of CERCLA because, from 1980 to 1985, they had arranged for the disposal of WFE's foundry wastes at the White Farm Equipment Dump Site. See CERCLA § 107(a)(3), 42 U.S.C. 9607(a)(3). The United States and Allied based their liability claims on the virtually complete control that petitioner and the related companies had exercised over WFE during the period in question. See Pet. App. A31-A33, A36-A37.

From 1980 to 1985, petitioner was the president, chairman, and sole shareholder of two investment holding companies, TIC Investment Corporation (TICI), and TIC United Corporation (TICU). In 1980, TICI purchased White Farm Industries, Inc. and White Farm U.S.A., which were holding companies for WFE. In 1981, TICI transferred ownership of WFE to TICU. From 1980 to 1985, petitioner served as chairman of the board of WFE. He also served as president of WFE, temporarily relinquishing that role to two persons who nominally served as presidents until petitioner fired them. Pet. App. A2-A5, A28-A31, A39-A40.

WFE's bylaws gave petitioner, as president, authority over the general management and control of the business and affairs of the company. Pet. App. A4, A40. Additionally, at all relevant times, petitioner did in fact exercise direct control over the ongoing operations and management of WFE. For example, he "talked daily, if not several times a day," with WFE's managers, he continuously received reports about the company's activities, he had final authority over WFE's management meetings, and he personally made significant changes respecting WFE's finances, contracts, operations, manpower, and employee benefits. See *id.* at A4-A5, A41-A43.

4. The district court granted partial summary judgment against petitioner, TICI, and TICU, holding that they were all liable as "arrangers for disposal" of hazardous substances at the White Farm site. Pet. App. A36-A51. The district court concluded that "[d]ue to [petitioner's] authority to control WFE and his actual exercise of control over WFE, he is directly liable as an arranger under CERCLA." *Id.* at A43. The court concluded that TICI and TICU

were similarly liable because of their "level of active involvement * * * in the affairs of WFE." *Id.* at A51.

5. The court of appeals affirmed in part and reversed in part the district court's grant of summary judgment. Pet. App. A1-A26. It held that "the proper standard to be applied in this case imposes direct arranger liability on a corporate officer or director if he or she had the authority to control and did in fact exercise actual or substantial control, directly or indirectly, over the arrangement for disposal, or the off-site disposal, of hazardous substances." Pet. App. A17.

The court concluded that petitioner was liable as an arranger under that standard, stating:

> In the present case the undisputed facts reveal that [petitioner] did not simply delegate authority and rely on the judgment of others; as a practical matter, his mandates left no room for others to exercise any decisionmaking authority or judgment in any area of the business, including hazardous waste disposal.

Id. at A19. The court determined that petitioner's actions had "inexorably led to the continuation of the disposal of WFE's wastes at the dumpsite," *id.* at A20, finding it "beyond dispute" that

> [petitioner], in his capacity as board chairman and chief executive officer of WFE, so usurped the power of those who were only nominally running WFE that he undertook responsibility for all of WFE's decisionmaking; he so tightly controlled WFE, particularly its budgetary aspects, that he left WFE employees no other choice but to continue with the relatively inexpensive arrangement

> that had historically existed between WFE and HEC.

Id. at A19 (footnote omitted). The court rejected petitioner's argument that he should be absolved of liability because he was not personally involved in the waste disposal decisions, stating that "[t]he lack of evidence showing that [petitioner] was personally involved in, or aware of, the details of the disposal arrangement does not bar his liability." *Id.* at A20.

The court of appeals applied a similar standard in determining whether TICI and TICU were liable as arrangers. See Pet. App. A23-A24. It concluded that there may be material issues of fact bearing on their liability and therefore reversed the district court's grant of summary judgment against them. See *id.* at A24-A26.

ARGUMENT

Petitioner asserts that the court of appeals erred in upholding the district court's finding that he was liable under CERCLA, in the absence of evidence that he either intended to or did personally participate in arranging for the disposal of hazardous substances. The court of appeals correctly rejected that contention. Its decision does not conflict with any decision of this Court or another court of appeals, and it raises no issue warranting this Court's review.

1. As petitioner concedes (Pet. 9), CERCLA imposes strict liability on specified categories of persons for the costs of responding to the release or threatened release of hazardous substances. See CERCLA § 107(a), 42 U.S.C. 9607(a). As petitioner also concedes (Pet. 9), the potentially responsible parties include any person who "arranged for disposal or treatment" of the hazardous substances.

CERCLA § 107(a)(3), 42 U.S.C. 9607(a)(3). See, *e.g.*, Pet. App. A7-A8; *United States* v. *Vertac Chem. Corp.*,, 46 F.3d 803 (8th Cir. 1995), cert. denied, 115 S. Ct. 2609 (1995); *Jones-Hamilton Co.* v. *Beazer Materials & Services*, 973 F.2d 688 (9th Cir. 1992); *Florida Power & Light* v. *Allis Chalmers*, 893 F.2d 1313 (11th Cir. 1990); *United States* v. *Aceto Agricultural Chemicals Corp.*, 872 F.2d 1373 (8th Cir. 1989).

The "precise" issue here is whether petitioner is liable under CERCLA as an "arranger" based on his virtually complete and actual control over WFE's operations, which "inexorably led to the continuation of the disposal of WFE's wastes at the dumpsite." Pet. App. A8, A19-A20. Petitioner contends that he is not liable because he took no "intentional acts" respecting WFE's disposal activities (Pet. 9-10) and exercised "mere indirect control" over that aspect of WFE's business (Pet. 10-13). He contends that he could not be liable as an arranger without "personal knowledge or involvement" in the waste disposal decisions. Pet. 13-18.

The court of appeals carefully considered and correctly rejected those contentions. Pet. App. A10-A17. The court concluded that arranger liability "requires some level of actual participation in, or exercise of control over, activities that are causally connected" to the waste disposal. *Id.* at A12. But it "does not impose the specific intent requirement urged by [petitioner]," which would insulate from liability those "who effectively dictate [a company's] hazardous waste decisions through day-to-day strict control of budgets, production, and capital investment." *Id.* at A17.

The court of appeals' ruling is consistent with CERCLA's language, which imposes liability on any

person who "by contract, agreement, *or otherwise*" arranges for disposal of hazardous substances. CERCLA § 107(a)(3), 42 U.S.C. 9607(a)(3) (emphasis added). That language reaches a person, such as petitioner, who had actual authority over "practically every major aspect of WFE's operations" (Pet. App. A16) and who "so tightly controlled" the company's financial outlays that he left "WFE employees no other choice but to continue" the improper disposal practices. Pet. App. A16, A19-A20. See also *id.* at A19-A20 n.8 (citing record evidence that petitioner "completely dominated all of the decisionmaking at WFE" and issued "strict instructions not to increase WFE's costs and to do everything possible to reduce costs across the board").

The court of appeals' decision is also consistent with CERCLA's fundamental objective of placing "the ultimate responsibility for clean up on 'those *responsible* for problems caused by the disposal of chemical poisons.'" Pet. App. A16. Petitioner's proposed requirement of "personal involvement" would create "a loophole for powerful individuals like [petitioner]." Pet. App. A15-A16. A corporate officer "who knows well enough to close his or her eyes to the specific details of the company's hazardous waste disposal practices, could avoid CERCLA liability," while the person "making the disposal arrangements —even if he or she had no meaningful decisionmaking authority—could *not* avoid personal liability." *Id.* at A16.

2. Petitioner is mistaken in suggesting (Pet. 6-7) that the court of appeals' decision in this case conflicts with the Second Circuit's decision in *General Electric Co.* v. *AAMCO Transmission, Inc.*, 962 F.2d 281, 287 (1992), and the Seventh Circuit's decision in

Amcast Industries Corp. v. *Detrex Corp.*, 2 F.3d 746 (1993), cert. denied, 114 S. Ct. 691 (1994).

In *General Electric*, the Second Circuit concluded that the terms of a contractual relationship between completely unrelated companies were insufficient to make one of them an arranger for disposal as a result of actions taken by the other. 962 F.2d at 286-288. The court noted that "[a]lthough arranger liability can attach to 'parties that do not have active involvement regarding the timing, manner or location of disposal,' there must be some nexus between the potentially responsible party and the disposal of the hazardous substance." *Id.* at 286 (citations omitted). The court suggested that the absence of "actual exercise of management authority" by one over the other was relevant. *Id.* at 287 n.4.

The court of appeals in this case expressly drew upon *General Electric*'s "nexus" requirement in analyzing the degree of participation or personal knowledge required to impose liability. Pet App. A12 n.4. It held, in accordance with the Second Circuit's decision, that "a finding of arranger liability requires some level of actual participation in, or exercise of control over, activities that are causally connected to, or have some nexus with, the arrangement for disposal" or off-site disposal of hazardous substances. *Id.* at App. A12. Here, the degree of management authority exercised by petitioner amply satisfies the Second Circuit's nexus requirement. See *Id.* at A19-A20 & n.8. Hence, there is no conflict between *General Electric* and this case.

In *Amcast*, the Seventh Circuit held that a shipper that had hired another company to deliver hazardous goods was not liable as an arranger for disposal when the company it hired inadvertently spilled some of the

goods at the delivery destination. 2 F.3d at 751. The court of appeals in this case concluded that *Amcast* "does not support" petitioner's position, noting that the release in that case had occurred through an accidental spill and there accordingly was "no arrangement" for that "disposal." Pet. App. 10, n.3. The court contrasted the situation presented here, where there was a specific arrangement between WFE and HEC for disposal of WFE's wastes at the dump site. Petitioner notes (Pet. 8, 10)) that the *Amcast* decision states that the words "arranged for" "imply intentional action." 2 F.3d at 751. But given the significantly different factual situations, that observation (made in the context of an inadvertent spill by a separate entity) does not give rise to a conflict between *Amcast* and the court of appeals' decision here.

3. There is no merit to petitioner's policy-based contentions (Pet. 7, 20-21) that the court of appeals' holding will subject "every chief executive officer of every corporation" to "virtually unlimited personal liability." The court based its decision "upon a fact-intensive examination of the totality of the circumstances," which demonstrated that petitioner had in fact exercised "substantial indirect control over the disposal arrangement." Pet. App. A20. As the court of appeals recognized, its holding is narrow and limited to the facts of this case: "Had [petitioner] truly delegated authority to others and allowed those individuals to exercise their judgment with respect to WFE's waste disposal practices without his interference, he would not be liable under the standard we have adopted today." *Id.* at A19.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The

Supreme Court of the United States

October Term, 1995

STRATTON GEORGOULIS,

Petitioner,

v.

UNITED STATES OF AMERICA AND
ALLIED PRODUCTS CORPORATION,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit**

PETITIONER'S REPLY TO RESPONDENTS' BRIEFS IN OPPOSITION

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STATUTES

42 U.S.C. § 9607(a)(3) 1

I. INTRODUCTION

The Eighth Circuit held in this case that *indirect* control over the arrangement for disposal of hazardous substances results in arranger liability. Respondents, not surprisingly, echo support for this holding. An overwhelming number of courts that have addressed the issue, however, have limited arranger liability to direct and deliberate participation in the disposal decision. To resolve this conflict between the circuits, the Court need answer only a single question: Does section 107(a)(3) of CERCLA impose arranger liability on a person who does not directly participate in the decision to dispose of hazardous waste? Petitioners urge the Court to grant the petition for certiorari to answer this question and resolve the conflict among the circuits.

II. ARRANGER LIABILITY UNDER CERCLA

A. CERCLA Section 107(a)(3).

Arranger liability under section 107(a)(3) may be imposed only on a person who:

1) by contract, agreement or otherwise,
2) arranged for
3) disposal or treatment
4) of hazardous substances
5) owned or possessed by such person.

42 U.S.C. § 9607(a)(3).

B. The Eighth Circuit's opinion.

The Eighth Circuit held that the "arranged for" element of section 107(a)(3) is satisfied when a person exercises "actual or substantial control, directly or *indirectly*, over the arrangement for disposal, or the off-site disposal, of hazardous waste." *United States v. TIC Inv. Corp.*, 68 F.3d 1085, 1089 (8th Cir. 1995) (emphasis added). The court found Georgoulis liable as an arranger because he "arranged for" disposal by exercising indirect control over the disposal decision. *Id.* at 1090. The court attributed "indirect" control to Georgoulis because he, like all corporate executives, had ultimate control of the corporation and did control certain aspects of WFE's operations. The facts demonstrate, however, that Georgoulis did *not* participate in or make any decisions relating to waste disposal, nor did he have any knowledge of any waste disposal decisions made by anyone else in the corporation. The Eighth Circuit's conclusion that Georgoulis's conduct demonstrates that he "arranged for" disposal conflicts with other circuits, which have limited arranger liability to those who actively participate in the disposal decision. In fact, the Eighth Circuit stands alone.

"Arranged for" is not defined by CERCLA and, under rules of statutory construction, the Eighth Circuit was required to give the term its ordinary meaning. *Asgrow Seed Co. v. Winterboer*, ___ U.S. ___, 115 S. Ct. 788, 793 (1995). In determining the ordinary meaning of "arranged for," the Eighth Circuit should have given effect to every word in the statute so that no words are rendered redundant. *Gustafson v. Alloyd Co., Inc.*, ___ U.S. ___, 115 S. Ct. 1061, 1063 (1995); *Department of Treasury v.*

Fabe, 508 U.S. 491, 504 n.6, 113 S. Ct. 2202, 2210 n.6 (1993). The Eighth Circuit did not. Instead of giving the term its ordinary meaning and a meaning separate from other elements of the statute, the court incorrectly construed the "arranged for" element of section 107(a)(3) under the analyses used to determine "owned or possessed" under section 107(a)(3) and "operator" liability under section 107(a)(2). In short, the Eighth Circuit effectively eliminated the "arranged for" element of arranger liability.

1. The Eighth Circuit incorrectly analyzed section 107(a)(3) and applied an "owned or possessed" analysis to determine the "arranged for" element of the statute.

While section 107(a)(3) requires proof of the other elements identified above, those other elements are not at issue here. The issue in this case relates solely to the "arranged for" element of arranger liability. The Eighth Circuit expressly recognized this. The court stated: "[T]here is no dispute that the hazardous substances disposed of at the dumpsite were owned by defendants. We need only decide whether or not defendants 'arranged for' disposal of hazardous substances at the dumpsite . . . " *United States v. TIC Inv. Corp.*, 68 F.3d 1085, 1086 (8th Cir. 1995); App. at 8. Nevertheless, the Eighth Circuit went on to apply the "owned or possessed" analysis of section 107(a)(3) in making its "arranged for" determination.[1]

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[1] In its Brief in Opposition, Respondent Allied highlights this difference by distinguishing *United States v. Vertac Chemical Corp.*, 46 F.3d 803 (8th Cir.), *cert. denied*, 115 S. Ct. 2609 (1995) from the instant case on the basis that the *Vertac* court was

The circuit courts have consistently interpreted the "owned or possessed" element of section 107(a)(3) to include liability for parties who have "authority to control" the disposal process. This was the issue addressed in *United States v. Vertac Chemical Corp.*, 46 F.3d 803 (8th Cir.), *cert. denied*, 115 S. Ct. 2609 (1995) and its progeny. *See generally, United States v. Iron Mountain Mines, Inc.*, 881 F. Supp. 1432 (E.D. Cal. 1995); *Maxus Energy Corp. v. United States*, 898 F. Supp. 399, 406-07 (N.D. Tex. 1995), *aff'd*, ___ F.3d ___ (5th Cir. Aug. 8, 1996). Specifically, the Eighth Circuit found Georgoulis's authority to control WFE's operations and his actual control of certain aspects of WFE's operations significant to the "arranged for" analysis. As explained below, however, Georgoulis's "authority to control" and actual control of WFE, if any, is not relevant to the "arranged for" analysis; it does not show that he "arranged for" the disposal. Regardless of Georgoulis's ownership or possession of the waste or "authority to control" the disposal, Georgoulis can *only* be held liable as an arranger if he *also* "arranged for" the disposal by actually participating in the decision to dispose. See infra § II.C.2.

The Eighth Circuit, therefore, incorrectly combined the "owned or possessed" element of arranger liability with the "arranged for" element, creating a conflict among the circuits on this issue and expanding CERCLA liability beyond that intended by Congress.

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analyzing the "owned or possessed" element and not the "arranged for" element of arranger liability.

2. The Eighth Circuit incorrectly analyzed section 107(a)(3) and applied an "owner/operator" analysis of section 107(a)(2) to determine the "arranged for" element of section 107(a)(3).

In imposing arranger liability on Georgoulis under section 107(a)(3), the court also relied upon cases like *United States v. Gurley*, 43 F.3d 1188 (8th Cir. 1994), which analyzed *operator* liability under section 107(a)(2). Yet, the Second Circuit made clear in *General Electric Co. v. AAMCO Transmissions, Inc.* that liability as an arranger under section 107(a)(3) has distinct characteristics from liability as an owner or operator under section 107(a)(2). 962 F.2d 281, 287 (2d Cir. 1992). For example, while the exercise of management authority is a factor in determining direct liability as an owner/operator under section 107(a)(2), this factor is not relevant to the arranger liability analysis under section 107(a)(3). *See General Electric*, 962 F.2d at 287 n.4.[2]

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[2] Contrary to Respondent's assertions, the court in *General Electric* did not suggest that the actual exercise of management authority is relevant to arranger liability. On the contrary, the Second Circuit quoted *Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 781 F. Supp. 1454, 1457 (N.D. Cal. 1991), which is a case involving a person's liability as an *owner/operator* under section 107(a)(2), to show that the exercise of management authority is an element in determining *owner/operator* liability under that section. The *General Electric* court did *not* apply the "management authority" test to determine arranger liability under section 107(a)(3). *General Electric*, 962 F.2d at 287 & n.4.

C. In all other circuits, Georgoulis would not be liable.

1. Georgoulis did not directly participate in the decision to dispose of waste.

There is no dispute in this case that Georgoulis had absolutely no knowledge of the existence or substance of the agreement between WFE and HEC for the disposal of waste. *TIC*, 68 F.3d at 1084. As a result, Georgoulis did not even know about, much less make or directly participate in, the waste disposal decision. Thus, all parties agree that any impact Georgoulis had on the disposal decision was, at most, *indirect*. The Eighth Circuit held such indirect impact sufficient for arranger liability under section 107(a)(3). All other circuits that have addressed the issue disagree.

2. All other circuits addressing the issue limit arranger liability to those who directly and actively participate in the decision to dispose of waste.

Prior to the Eighth Circuit's decision in this case, the circuit courts of appeals addressing the issue have refused to impose arranger liability unless (1) the party personally participated in the decision to dispose of waste *or* (2) had an obligation to arrange for the disposal of waste.[3] *See South Florida Water Mgmt. District v. Montalvo*, 84 F.3d 402, 409 (11th Cir. 1996); *General Electric*, 962

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[3] The obligation to arrange for disposal arises in circumstances where a party assumes a duty to arrange for the disposal of hazardous waste. This would occur, for example, when a person enters into a contract under which he agrees to

F.2d at 286-87. In *Montalvo*, the Eleventh Circuit refused to impose arranger liability on landowners who had contracted with a pesticide company to spray their property because the landowners did not take any affirmative act to dispose of the waste. *See Montalvo*, 84 F.3d at 407-08. Consistent with these cases, the Ninth Circuit imposed arranger liability on a corporation that actively participated in the decision to arrange for waste disposal by entering into a contract for such arrangement. *See Jones-Hamilton Co. v. Beazer Materials & Servs., Inc.*, 973 F.2d 688, 695 (9th Cir. 1992). Ironically, in both *United States v. Northeastern Pharmaceutical & Chemical Co., Inc.*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987) and *United States v. Aceto Agr. Chem. Corp.*, 699 F. Supp. 1384 (S.D. Iowa 1988), *aff'd in part, rev'd in part on other grounds*, 872 F.2d 1373 (8th Cir. 1989), the court of appeals in this case – the Eighth Circuit – also expressly limited arranger liability to those who actually participated in the decision to dispose of waste.

Respondents argue that the Eighth Circuit's decision in this case is consistent with that of the Second Circuit in *General Electric* because *General Electric* applied a "nexus" requirement. The nexus requirement established in *General Electric*, however, differs substantially from that created by the Eighth Circuit in this case. Under *General Electric*, a party "arranged for" the disposal of hazardous

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accept the obligation of waste disposal. *See, e.g., General Electric*, 962 F.2d at 287. Such an obligation is not present in the instant case and Respondents have not urged the existence of such an obligation. Moreover, the Eighth Circuit did not find Georgoulis liable as an arranger based on any obligation to arrange.

waste *only* if that party (1) actively participates in the decision to dispose of hazardous waste *or* (2) has the obligation to exercise control over hazardous waste disposal. 962 F.2d at 286-87.

While the Eighth Circuit in this case stated that it was applying the nexus test of *General Electric* in its analysis, it did not. The court neither based its decision on any obligation of Georgoulis to exercise control over the hazardous substances nor held that Georgoulis actively participated in the decision to dispose of hazardous waste. On the contrary, the Eighth Circuit imposed liability on Georgoulis for conduct which it said *indirectly* impacted the disposal process after expressly finding that he did not actively participate in the disposal decision. The Eighth Circuit thus created a new test for arranger liability that expands liability beyond the Second Circuit's nexus requirement in *General Electric*.

Additionally, district courts have consistently limited arranger liability to those who actively participate in the decision to arrange for disposal of waste. *See State ex rel. Howes v. W.R. Peele, Sr. Trust*, 876 F. Supp. 733, 742 n.2 & 743, *clarification denied*, 889 F. Supp. 849 (E.D.N.C. 1995) (finding arranger liability for corporate officer who personally made the business decision and directed individuals to dispose of waste, and finding no arranger liability for president of company who did not directly participate in the decision to dispose of waste); *United States v. Shell Oil Co.*, 1995 U.S. Dist. LEXIS 19778, *23 (C.D. Cal. 1995) (finding arranger liability where Government actually "undertook the rental of storage tank for disposal of acid wastes"); *State of New York v. SCA Servs., Inc.*, 844 F. Supp. 926, 928 (S.D.N.Y. 1994) (finding arranger liability for

corporation that transported hazardous waste where corporation actually contacted disposal company to arrange for disposal of waste despite corporation's lack of awareness regarding ultimate disposal site of waste); *United States v. Ward*, 618 F. Supp. 884, 894-95 (D.C.N.C. 1985) (finding corporate officer liable as arranger because he was "personally involved in the decision" to dispose of hazardous waste). As a result, the Eighth Circuit stands alone in imposing arranger liability on one who does not directly and personally participate in the decision to dispose of hazardous waste.

3. The "intentional conduct" requirement of the "arranged for" element means active participation in the decision to dispose.

As explained by Petitioner in his principal brief, "arranged for" implies intentional conduct. *See, e.g., Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746, 751 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 691 (1994). A party must intend to arrange for disposal before it can be liable under section 107(a)(3) of CERCLA. *Id.* The use of the "intent" terminology apparently led to some confusion on the part of Respondents and the Eighth Circuit. Petitioners agree with Respondents and the Eighth Circuit that there is no "intent to *dispose*" requirement for arranger liability. However, as described above, there is an "intent to *arrange*" requirement, i.e. a requirement of actual, direct participation in the decision to dispose. Because the Eighth Circuit's opinion in the instant case imposes liability based on indirect rather than direct and

deliberate participation in the disposal decision, it conflicts with cases imposing an intent "to arrange" requirement.

III. CONCLUSION AND PRAYER

The Eighth Circuit's new test for arranger liability effectively eviscerates the "arranged for" element of section 107(a)(3). This result conflicts with both the plain meaning of section 107(a)(3) of CERCLA and the decisions of other circuit courts that have addressed the issue. Thus, contrary to the Respondents' assertions, this is precisely the circumstance that requires the exercise of the Court's jurisdiction. Petitioner respectfully urges the Court to grant the petition for certiorari.

Respectfully submitted,

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